IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1522

RAFAEL HERNANDEZ COLON, ETC., *Appellants,*

v.

GERMAN ORTIZ, ETC., *Appellees.*

On Appeal From a Judgment of the United States District Court for the District of Puerto Rico

JURISDICTIONAL STATEMENT

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On Appeal From a Judgment of the United States District Court for the District of Puerto Rico

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JURISDICTIONAL STATEMENT

TO THE HONORABLE COURT:

Appellants take this appeal from the judgments and orders of the United States District Court for the District of Puerto Rico entered on January 16, 1974 and April 2, 1975, respectively. The Court held unconstitutional the local statute [21 LPRA 1152b] which authorizes the Governor of Puerto Rico to appoint five out of seventeen members of the Municipal Assembly of San Juan and permanently enjoined all the appointed members from occupying or continuing to occupy their offices. The Governor was enjoined from filing any vacancies therein.

OPINIONS BELOW

There have been various opinions and orders by both the District Court and the Court of Appeals for the First Circuit. The pertinent part of the original opinion and judgment entered on January 8, 1973 by the District Court dismissing the complaint is set forth as Appendix B. (This later became the dissenting opinion)

The first opinion of the Court of Appeals remanding the case for consideration by a Three-Judge-Court is reported as *Ortiz* v. *Colón,* 475 F.2d 135 (1973). The January 16, 1974 opinion and judgment of the Three-Judge-Court holding the statute unconstitutional is reported on 385 F. Supp. 111, *Ortiz* v. *Colón,* (Included as Appendix C). The opinion of the Court of Appeals for the First Circuit dismissing the appeal for lack of jurisdiction is herein included as Appendix D. The Order by the Three-Judge-Court entered on April 3, 1975 is included as Appendix E. The Judgment of Permanent Injunction of the same date is included as Appendix F.

JURISDICTION

This is an appeal from judgments of a Three-Judge-Court. Said Court was properly convened under 28 U.S.C. 2281 and the order of the Court of Appeals for the First Circuit, 475 F.2d 135 whose decision as to the necessity of convening a Three-Judge-Court to hear this case was and is accepted by the parties as correct. Thus, this Honorable Court has jurisdiction pursuant to 28 U.S.C. 1253 to consider this direct appeal. *Harris County Commissioners Court* v. *Moore,* — U.S. —, 43 L.Ed.2d 32 (1975); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 40 L.Ed.2d 452, 94 S.Ct. 2080 *reh. den.* 417 U.S. 977, 41 L.Ed.2d 1148, 94

S.Ct. 3187 (1974). Since the statute was held invalid and a permanent injunction was entered, a direct appeal to this Court is permissible. *M.T.M. Inc.* v. *Baxley, etc.,* — U.S. —, 43 L.Ed.2d 636 (1975). The Notice of Appeal was timely filed on April 4, 1975 (copy is attached as Appendix G).

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT HAD JURISDICTION OVER THE COMPLAINT PURSUANT TO TITLE 28 UNITED STATES CODE; SECTION 1343(3).

II. WHETHER THE DISTRICT COURT SHOULD HAVE ABSTAINED FROM PASSING UPON THE INTERPRETATION AND VALIDITY OF THE STATUTE.

III. WHETHER THE STATUTORY SCHEME PERMITTING THE APPORTIONMENT OF FIVE OUT OF SEVENTEEN MEMBERS OF THE MUNICIPAL ASSEMBLY OF SAN JUAN VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION OR WHETHER IT IS A VALID EXERCISE OF THE POWERS GRANTED BY THE CONSTITUTION OF THE COMMONWEALTH AND THE COMPACT BETWEEN THE UNITED STATES AND PUERTO RICO.

IV. WHETHER THE PERMANENT INJUNCTION JUDGMENT RESTRAINING DEFENDANTS FROM ACTING PURSUANT TO THE STATUTE IS JUSTIFIED UNDER THE SPECIFIC CIRCUMSTANCES OF THIS CASE.

STATUTES INVOLVED

The statute held unconstitutional, Article 10 of Law No. 142, approved on July 21, 1960, is reported on Title 21 Laws of Puerto Rico Annotated, section 1152.

It provides as follows:

"§ *1152. Number of Members*

(a) *Generally.* The municipal assembly shall be composed of sixteen (16) members in municipalities whose population, in accordance with the last decennial census, is or exceeds forty thousand (40,000); fourteen (14) in municipalities whose population is or exceeds twenty thousand (20,000); and twelve (12) in all other municipalties, with the exception of San Juan and Culebra whose municipal assemblies shall consist of seventeen (17) and five (5) members, respectively.

(b) *Special provision for San Juan. The Municipal Assembly of San Juan shall be composed of seventeen (17) members. Twelve (12) of these seventeen (17) members shall be elected at each general election by the qualified voters of San Juan and the other five (5) shall be appointed by the Governor with the advice and consent of the Senate. No political party may nominate and elect more than nine (9) members.*"

STATEMENT

This action began with a complaint filed on January 3, 1973 in the United States District Court for the District of Puerto Rico. Jurisdiction was invoked pursuant to the Fifth and Fourteenth Amendments to the U. S. Constitution, 42 U.S.C. 1983, 28 U.S.C., sections 1343 (3); 2201, 2202, 2281, 2284. The main basis for the complaint was that the special provision for San Juan was invalid because the votes of the residents of San Juan were diluted in comparison with other voters and that the statute deprived them from voting for all the members of the legislative assembly of San Juan. After a hearing was held and written memoranda filed, Chief Judge Hiram R. Cancio held that this was an action for a single judge, that the statute did not de-

prive plaintiffs of the equal protection of the laws and dismissed the complaint. (Appendix B). The Governor proceed to appoint the other appellants herein as members of the Assembly. An Amended and Supplemental Complaint was filed which was also dismissed. (Copy of that Complaint is hereby included as Appendix A). On plaintiffs appeal, the Court of Appeals for the First Circuit remanded the case for consideration by a Three-Judge-Court; 475 F.2d 135. The Three-Judge-Court entered a judgment on January 16, 1974 decreeing that the statutory scheme employed by the Commonwealth for constituting the Municipal Assembly of San Juan constitutes an unconstitutional deprivation of equal protection and impairs the voting rights of certain residents of San Juan. *Ortiz* v. *Colón,* 385 F. Supp. 111 (1974). (Appendix C) The Court retained jurisdiction while deferring for one year a hearing on the issuance of a final injunction. The Court rejected the broad challenge to the statute to the effect that the scheme was contrary to the "'one person, one vote" doctrine elaborated by this Court. *Reynolds* v. *Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964); *Sailors* v. *Kent Board of Education,* 387 U.S. 105, 18 L.Ed.2d 650, 87 S.Ct. 1459 (1967). But it found the statute unconstitutional because it diluted the voting power of some San Juan residents relative to other San Juan residents in that ". . . a local minority of voters within San Juan that happens to be part of a state-wide majority may gain a majority of votes within the Municipal Assembly. Such a minority need elect only one assemblyman directly in order to be able to defeat an issue requiring a two thirds vote; and it can run all of the affairs of San Juan if it succeeds in electing directly a mere third of the elected members.

This additional representation for the minority, albeit indirect, results in systematic discrimination against those San Juan voters who did not support the winning gubernatorial candidate . . .". The Court employed the strict scrutiny test, requiring a showing that the state action is reasonably necessary to promote a compelling state interest. Under this test it did not consider the means chosen to achieve the end reasonably necessary. Judge Cancio dissented for the reasons stated in his earlier opinion, (Appendix B).

Defendants appealed to the Court of Appeals for the First Circuit but that Court dismissed the appeal for lack of jurisdiction. (Appendix D).

Following remand, plaintiffs, appellees moved for the entry of a permanent injunction. Appellants filed a Motion To Dismiss and For Rehearing. (Appendix H). Our motion was predicated on the lack of jurisdiction to consider actions under 28 U.S.C. 1343 because the Commonwealth is not a State or Territory under the civil rights statutes invoked. We also urged the Court to abstain from considering the case in light of the recent decision in *Harris County Comm. Court* v. *Moore*, — U.S. —, 43 L.Ed. 32 (1975). The District Court rejected both contentions although it only discussed the abstention issue. (April 3, 1975, Order, page 2, Appendix E). On April 3, 1975 a Judgment of Permanent Injunction was entered removing the appointed members, appellants herein, from their offices and restraining appellant Hernández-Colón from appointing any new member. After the appeal was filed, we filed in this Honorable Court an Application for Stay of Judgment which was granted on April 14, 1975 (Case No. A-818).

THE QUESTIONS ARE SUBSTANTIAL

Summary of Argument

A) Although it did not elaborate on its reasons, the District Court rejected appellants contention that there was no jurisdiction pursuant to 28 USC 1343 and 42 USC 1983, part of the Civil Rights Acts.[1] We respectfully submit that the Commonwealth of Puerto Rico is not a State or Territory within the purposes of said statutes. This question was expressly left open by this Court in *Calero-Toledo* v. *Pearson Yacht Leasing Co., supra,* 40 L.Ed.2d at 464, ft. 11. Section 1343 of Title 28 USC is the only jurisdictional basis for the action. Hence the action should have been dismissed for lack of jurisdiction.[2]

B) This appeal also presents fundamental and substantial questions as to the scope of the doctrine of

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[1] These statutes provide as follows:

§ 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

§ 1343

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

[2] The identical question has been raised in *Flores de Otero, etc.,* v. *Board of Examiners, etc.,* No. 74-1267, Jurisdictional Statement filed on April 7, 1975.

abstention when federal courts are asked to interpret statutes enacted by the Commonwealth of Puerto Rico. Aside from the general questions presented, this case is particularly appropriate because it deals with a statutory scheme with deep roots in the Spanish regime, under which similar systems were widely utilized. An interpretation of the scheme also depends on the extent of the powers granted by the local Constitution to legislate in matters pertaining to the municipalities and their relation with the constitutional safeguards guaranteed by the Constitution of the Commonwealth of Puerto Rico.

C) On the merits of the constitutional question presented, we submit that the doctrine of "one person, one vote" is not pertinent to the analysis of the statutory scheme; that in any event, the strict test of judicial scrutiny regarding the compelling state interest, is not pertinent herein and that even if it were, the means chosen to achieve that compelling state interest are reasonably related to it.

D) We also submit that even if this Honorable Court concurs with the District Court's holding, the injunction order is too broad. Under the facts and legal conclusions present the Court should have limited itself to restraining the Governor from enforcing the statute in the 1976 elections and not remove the appointed members of the municipal assembly of San Juan.

ARGUMENT

I. The Court Below Erred In Holding That It Had Jurisdiction Founded Upon 42 U.S.C. 1983 and 28 U.S.C. 1343.

Although in its April 3, 1975 Order the District Court did not elaborate on this question it followed the

First Circuit's comments made through Senior Circuit Judge Aldrich, whose main rationale was the following:

> "The citizens of the several states are permitted to seek redress in the federal courts for deprivation of their rights under color of state law without first seeking relief in the state courts. *Monroe* v. *Pape,* 1961, 365 U.S. 167, 183. We yield to no one in our regard for the Supreme Court of Puerto Rico, but at the same time, if citizens of the several states may call for an initial decision in the district court without deferring to the courts of their local state, we must wonder how we could conscientiously hold that under 28 U.S.C. § 1343 United States citizens resident in Puerto Rico are any less entitled."

A similar approach was used in *Marin* v. *UPR,* 377 F. Supp. 613 (D.P.R. 1973). We respectfully submit that the comparison with the citizens of the 51 states is ill founded. As we shall further elaborate, for the purposes of § 1343 the residents of Puerto Rico should be treated in the same manner as those residing in the District of Columbia. The latter are not in an inferior position in respect to the quest of redress for deprivations of their civil rights. Rather it is only a matter of the forum where the actions are to be brought. This is specially so if it is considered that there is nothing preventing state courts from entertaining and deciding civil rights actions brought under 42 USC 1983. *Brown* v. *Pitchess* (California Supreme Court, 2-19-75, 16 Cr. L. 2516). And the Commonwealth courts can enter injunctions for violations of civil rights. See Law No. 12 of August 8, 1974. (Appendix I)

In *Calero-Toledo, supra,* 40 L.Ed.2d at 464, ft. 11, this Court expressed that:

"We have no occasion to address the question whether Puerto Rico is a 'State' for purposes of 28 U.S.C. 1343 [28 USCS 1343], a jurisdictional basis of appellee's complaint".

It did not reach the question because jurisdiction was found to exist under 28 U.S.C. 1331. In this case the only jurisdictional basis is 28 U.S.C. 1343(3). This by itself establishes that this question is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for its resolution. Section 1343 came into being as part of the Civil Rights Acts enacted during the late 1860's and early 1870's. It was one of the means established to award jurisdiction to the federal courts over actions against the State to redress deprivation of constitutional rights which were mostly uncontrolled after the Civil War. Together with the predecessor of 42 U.S.C. 1983, it was enacted to vindicate rights protected by the Fourteenth Amendment. For a historical view of 1343, see *Zwickler* v. *Koota,* 389 U.S. 241, 19 L.Ed.2d 444 (1967), 88 S.Ct. 391.

In this case jurisdiction under 1343 depends upon the applicability to the Commonwealth of Art. 1 of the Civil Rights Act, 42 U.S.C. 1983. *District of Columbia* v. *Carter,* 409 U.S. 418, 34 L.Ed.2d 613, 93 S.Ct. 602, *reh. den.* 410 U.S. 959, 35 L.Ed.2d 694, 93 S.Ct. 1411 (1973) held that the District of Columbia was not a "state or Territory" within the purposes of 42 U.S.C. 1983 and that the District Court lacked jurisdiction over a claim based upon that section. The Court made a complete historical analysis of the Civil Rights Acts and found that 1983 was enacted as a means to "enforce the provisions of the Fourteenth Amendment", *Carter, supra,* 34 L.Ed.2d at 619. Since the District is

not a State within the meaning of the Fourteenth Amendment, neither the District nor its officers are subject to its restrictions. Thus this Court held that section 1983 is not applicable to the District. This was based upon an extensive examination of the legislative history of 1983 and the nature of the District of Columbia.

As to the legislative history of section 1983, there is no question that the evils which it sought to correct were ever present in Puerto Rico. On the contrary both before and after the birth of the Commonwealth in Puerto Rico, the local courts have had the power and the willingness to protect and enforce federal rights. See *Mongil Suárez* v. *Administrador Deporte Hípico,* 354 F. Supp. 320 (DPR 1972); Law No. 12, Appendix I, *supra;* 4 L.P.R.A. 62. Note also that state courts can decide civil rights actions. *Brown* v. *Pitchess,* California Supreme Court, 2/19/75, 16 Cr. L. 2516.

Like the District, the Commonwealth is truly *sui generis* within the national governmental structure, *Carter, supra.* 34 L.Ed.2d at 625. It is significant that this Court has compared the nature of the District with that of the Commonwealth. *Palmore* v. *United States,* 411 U.S. 389, 36 L.Ed.2d 342, 93 S.Ct. 1670 (1973), where this Court recognized that the District of Columbia is constitutionally distinct from the States and following *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 27 L.Ed.2d 174, 91 S.Ct. 156 (1970) held that a statute of the District is not a State statute for the purposes of 28 U.S.C. 1257. The Court also held that the rationale of *Balzac* v. *Puerto Rico,* 258 U.S. 298, 66 L.Ed. 627, 42 S.Ct. 343 (1922), that a Puerto Rican statute was a State statute for purposes of appeal was severely

undermined in *Fornaris*. The situation herein is similar to the one present in *Fornaris* and *Palmore*. That is, sections 1983 and 1343 should not be held applicable to the Commonwealth in the absence of a more definitive guidance from Congress. *Palmore*, 36 L.Ed.2d, at page 351.

Although the source of congressional power over the District, (Art. 1, sec. 8, cl. 17 of the Constitution) is different than the one in Puerto Rico, both possess different traits than the States or Territories. The source of Congressional power over the Commonwealth is the compact between the United States and Puerto Rico (Public Law 600, 64 Stat. 319; 66 Stat. 327, note 48 U.S.C. 731 d.) *Calero-Toledo, supra*. Thus the question as to whether a particular Congressional enactment is applicable to Puerto Rico has to be answered in terms of the Compact. That is, whether their applicability is consonant with the Compact. See *Caribtow Corp.* v. *Occupational Safety and Health Review Comm.*, 493 F.2d 1064 (1 CA, 1974); *N.L.R.B.* v. *Security National Life Ins. Co.*, 494 F.2d 336, *Hodgson* v. *Union Empleados de los Supermercados Pueblo*, 371 F. Supp. 56 (DPR 1974); *Liquilux Gas Services of Ponce, Inc.* v. *Tropical Gas Co.*, 303 F. Supp. 414 (DPR 1969) and cases cited therein. And see, Leibowitz, The Applicability of Federal Law To The Commonwealth of Puerto Rico, 56 GEO. L. J. 219 (1967).

That same flexible approach has been used by this Court. Compare *Fornaris* v. *Ridge Tool Co., supra* (Puerto Rico not a State for the purposes of this Courts appellate powers, 28 U.S.C. 1257) and *Calero-Toledo, supra,* (Puerto Rico is a State for the purposes of the Three-Judge-Court Act, 28 U.S.C. 2281) In neither of this two cases did this Court find it necessary to express whether the Fifth or Fourteenth Amendment is applicable to Puerto Rico.

Thus the question of the applicability of the Civil Rights Statutes, depends upon an interpretation of the Compact and the pertinent statutes. This Court recognized in *Calero-Toledo* that the Compact had brought about significant changes in Puerto Rico's governmental structures, the main one being a much higher degree of autonomy and sovereignty over purely local matters. This novel political experiment strengthened the relationship between Puerto Rico and the Federal government and has turned the Island into a highly unique and *sui generis* structure within the United States federal system. It would be inconsistent with the deference shown by Congress and this Court to Puerto Rico's government and with the changes of the political structure brought about by the Compact, to subject all the local statutes and actions to the strict supervisory powers of the federal courts as if we were a State or Territory.

While Puerto Rico possesses a higher degree of sovereignty than the District, Congress still possesses power to legislate over it, due to the provision of the Federal Relations Act, 48 U.S.C. 734, which continued in effect by virtue of the Compact.

Because Puerto Rico is not a "State" within the full meaning of that term; *Fornaris, supra; Sánchez* v. *U.S.*, 376 F. Supp. 239 (DPR 1974); *Mora* v. *Torres*, 11 3F. Supp. 309, 319 (DPR 1953), or a Territory, within the constitutional context used in the *Carter* case; *Montalvo* v. *Colón*, 377 F. Supp. 1332, 1340[3]

[3] See ft. 23 at 1341-42 for Judge Coffin's views on the applicability of constitutional safeguards to the Commonwealth, which are consonant with the flexible approach urged by appellants.

(DPR 1974), *Hodgson, supra,* neither the Civil Rights Act, 42 U.S.C. 1981, 1983 nor its jurisdictional counterpart, 28 U.S.C. 1343 are applicable to Puerto Rico.

II. Whether the District Court Should Have Abstained From Passing Upon the Interpretation and Validity of the Statute

The Three-Judge-Court followed the reasoning of the February 28, 1975 opinion of the Court of Appeals, (Appendix D) which by way of dictum, expresses at footnote 1 that:

> "The Puerto Rico Court could not, by any process of construction, alter the fact that the Governor of Puerto Rico can appoint five persons of his choice to the San Juan Assembly; not could it by interpretation avoid the consequence that by this action he may change a minority party in the Assembly into a majority".

But our contention as to the applicability of the abstention doctrine does not depend upon an interpretation of the literal meaning of the statute. We admit that the statute itself has only one interpretation. But we insist that there is an unsettled question of local law, mainly whether the statute contradicts or goes beyond the authority granted by the Constitution of the Commonwealth of Puerto Rico in Article VI, section 1, which gives the Legislature power among other things, to determine the organization and functions of the local municipalities or in Article II, section 1, which guarantees the equal protection of the laws. Thus, we have here the same situation present in *Harris County Commissioners Court, et al* v. *Moore, supra,* 43 L.Ed.2d 23 (1975). There the Court abstained mainly because there was an unsettled question regarding the relationship between the state constitution and a statute. No

question was there present which dealt with the interpretation of the meaning of the statute and its scope. Thus that case expands the doctrine of abstention.

The same is applicable herein because a decision by the local court could settle the underlying state question and avoid the possibility of unnecessarily deciding a federal constitutional question.

Abstention is particularly appropriate in this case. This is a scheme which has into roots in the colonial Spanish regimes. The local courts are in a much better position to place the scheme in its proper historical perspective. The local courts can also compare the present scheme with the ones enacted from 1931.[4] A decision by the local court will also remove any federal question in that it is able to consider and decide on the basis of both the local Constitution and its federal counterpart.

We submit that the *Moore decision, supra,* has expanded the abstention doctrine in a manner favorable to the States. This is more so in the case of Puerto Rico, where this Court has consistently used a far more liberal abstention test in favor of the local construction of its laws. *Fornaris, supra, Wackenhut, infra,* cited with approval in *Calero-Toledo, supra.* In *Wackenhut* v. *Aponte,* 266 F. Supp. 401, affd. 386 US 268, 18 L.Ed. 2d 37, 87 S.Ct. 1017 (1967) the Court expressly held that:

> "'application of the doctrine of abstention is particularly appropriate in a case . . . involv[ing] the construction and validity of a statute of the Com-

[4] See Justice Wolff concurrent opinion as to that statute in *Roosevelt, Governor* v. *District Court,* 42 P.R.R. 803 (1931). Those comments are not binding. The present Court can adopt its own criteria on the validity of the statute.

monwealth of Puerto Rico. For a due regard for the statutes of the Commonwealth under its compact with the Congress of the United States dictates, we believe, that it should have the primary opportunity through its courts to determine the intended scope of its own legislation and to pass upon the validity of that legislation under its own constitution as well as under the Constitution of the United States.'" (Cited with approval in *Calero-Toledo,* supra, 40 L.Ed.2d at 463)

This criteria was adopted with the specific holding that the special regard due to the Commonwealth warrants abstention. If this reality is considered with the pre-Commonwealth respect and deference given by this Court to the local interpretations of the Civil Code and related statutes,[5] then the abstention doctrine is even more appropriate. This Court could also avail itself of the Certification procedure which was enacted locally through Law No. 13, August 8, 1974 (Included herein as Appendix J).

In addition abstention is more appropriate here because it would serve to avoid "the hazard of unsettling some delicate balance in the area of federal-state relationships". Justice Harlan's concurrent opinion in *Zwickler* v. *Koota,* 389 U.S. 241, 19 L.Ed. 444, 454-55, 88 S.Ct. 391. Abstension in cases dealing with Commonwealth statutes clearly serves this purpose. It should be specially noted that an Ad Hoc Commission has been named to study the special relationship between Puerto Rico and the United States for the purpose of study-

[5] "Out of that experience grew a pronouncement that a Puerto Rican Court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong.' See *Bonet* v. *Texas Co.*, 308 U.S. 463, 471, 84 L. ed. 401, 60 S. Ct. 349." *Fornaris* v. *Ridge Tool, supra,* 27 L. Ed. 2d at 177.

ing, of proposing legislation, and formulate recommendations tending to satisfy the aspirations of the people freely expressed in the 1967 plebiscite.[6]

In this particular case abstention is appropriate because the local ruling could avoid the necessity of passing upon the federal claim. If the statute is found unconstitutional, no further litigation is needed. On the other hand the Supreme Court can consider both, the federal and local claims. If it upholds the statute, the voters can directly seek review in this Court. 28 U.S.C. 1258.

III. Whether the Statutory Scheme Permitting the Appointment of Five out of Seventeen Members of the Municipal Assembly of San Juan Violates the Equal Protection Clause of the U.S. Constitution or Whether It Is a Valid Exercise of the Powers Granted by the Constitution of the Commonwealth and the Compact Between the United States and Puerto Rico.

The Three-Judge-District Court correctly held that this case does not present a situation of denial of the "one-person, one-vote" doctrine as elaborated in the reapportionment cases.

But it ruled that the votes of some residents of San Juan were diluted in comparison with other residents of San Juan. To justify this holding the Court reasoned as follows:

"Here, residents of San Juan who vote in the statewide gubernatorial election for the winning

[6] This Commision is a consequence of congressional action contained in Public Law 88-271 of February 20, 1963 and the action of the Legislature of Puerto Rico Law Number 9 of April 13, 1964. The present Joint Committee was appointed upon the request of the Government of Puerto Rico by the President of the United States and the Governor of Puerto Rico.

candidate gain the indirect representation, within the Municipal Assembly, of the five assemblymen appointed by the Governor. In effect, residents of San Juan, who, in voting for governor, find themselves in accord with a majority of their fellow electors—many of whom may reside outside the city—have significantly more voting power in their own Municipal Assembly than residents of San Juan who supported a losing gubernatorial candidate. The Governor's five appointees owe their allegiance, in large part, to those voters who supported the Governor in the last gubernatorial election, voters whose interests and views they are likely to represent. And because the appointees are members of the same legislative body, with the same functions and duties, as the elected members, a local minority of voters within San Juan that happens to be part of a statewide majority may gain a majority of votes within the Municipal Assembly. Such a minority need elect only one assemblyman directly to defeat an issue requiring a two thirds vote; and it can run all of the affairs of San Juan if it succeeds in electing directly a mere third of the elected members. This additional representation for the minority, albeit indirect, results in systematic discrimination against those San Juan voters who did not support the winning gubernatorial candidate".

"These conclusions are highly speculative and as such can be categorized as 'theoretical presumtion' like the one which moved this Court to reverse the judgment in *Dallas County Alabama* v. *Reese,* No. 74-1077, Per Curiam Opinion, May 19, 1975, 43 LW 6311. As in that case the Court in this case relied on this theoretical presumption to reach its determination that some residents of San Juan were victims of invidious discrimination. In so doing it committed plain error and its judgment should be reversed."

As we shall further elaborate, the basic error committed by the District Court is that it considered the scheme as one falling under the one-person, one-vote doctrine, as developed in cases such as *Reynolds* v. *Sims, supra,* 377 U.S. 82; *Mahan* v. *Howell,* 410 U.S. 315, 35 L.Ed.2d 320, 93 S.Ct. 979 (reapportionment cases) and also as one affecting the right to vote, as developed in cases such as *Gomillion* v. *Lightfoot,* 364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct. 125 (1960); *Cipriano* v. *City,* 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969); *Kramer* v. *Union Free School District,* 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969). The Court mixes both criterias and concludes that the votes of those who voted for the majority party in San Juan were adversely affected. We submit that neither of those line of decisions is pertinent to the analysis of the statute. The approach should have been based on cases such as *Gordon* v. *Lance,* 403 U.S. 1, 29 L.Ed.2d 273, 91 S.Ct. 1889 and *Forston* v. *Morris,* 385 U.S. 231, 17 L.Ed.2d 330, 87 S.Ct. 446, which recognize that there is no constitutional guarantee that the majority always prevail on every issue, including the election of public officers. Under this approach, considered together with the autonomy and sovereignty which the Commonwealth enjoys, *Calero-Toledo, supra,* the statute must be considered as a valid exercise of the powers of the Commonwealth Legislature and it must be held not to deprive the voters of any federally protected right. The holding of the Court is inconsistent with its admission that:

> "'Not every limitation or incidental burden on the exercise of voting rights is subject to strict scrutiny, *Bullock* v. *Carter,* 405 U.S. 134, 143 (1972); *McDonald* v. *Board of Education,* 394 U.S. 802 (1969). In a series of recent decisions,

the Supreme Court has given states some leeway in designing apportionment schemes which are reasonably related to valid state policies, such as respecting the boundaries of political subdivisions. See *Mahan* v. *Howell,* 410 U.S. 315 (1973); *White* v. *Regester,* 412 U.S. 755 (1973); *Gaffney* v. *Cummings,* 412 U.S. 735 (1973)' ".

Nevertheless it found that the alleged infringement is substantial. We disagree. We contend that the infringement, if any, is more close to that present in *Salyer Land Co.* v. *Tulare Basin,* 410 U.S. 719, 35 L.Ed. 659, 93 S.Ct. 1224 (1973), than in cases such as *Reynolds* v. *Sims,* supra, 377 U.S. 562.

Another basic reason for noting probable jurisdiction over this appeal, is that it presents a unique opportunity to pass upon the open question left in *Sailors* v. *Kent Board of Education,* 387 U.S. 105, 18 L.Ed.2d 650, 87 S.Ct. 1549 (1967) as to whether a local legislative assembly can be appointed rather than elected. Here we have a mixed appointive and elective system.

With those general criterias in mind, we shall now attempt to make a more specific analysis of the statutory scheme and the District Court's holding.

In order to fully discuss our contention that the scheme herein is completely valid, it is necessary to analyze it in its complete historical perspective, which the Court below fails to do. The Court fails to investigate the socio-political genesis of the statute that, as we shall shortly see, is a projection of the better part of Puerto Rico's former political order and is in no way at odds with our Constitution. In consequence the opinion fails the spirit of *Fornaris* which wishes that this peculiarities of Puerto Rico's past be taken into account. From this lack of social and historical perspective in the interpretation of the statute flows into the opinion what we believe is a fundamental and often repeated error, to wit: that the appointment of the assemblymen by the Governor is an oblique action of the San Juan electorate.

Although substantially ignored in the non-Hispanic world, the municipal organization of Spanish-America in colonial times was eminently democratic and representative. Taking into account the contingencies of time and place plus the normal exceptions, the municipal organization in the larger Spanish-American cities lived within these institutional principles for centuries.

The "cabildo abierto", or town meeting, was the basic political unit of colonial days. The "cabildo abierto" was the totality of the people in action. These "cabildos abiertos" normally acted through chosen representatives which collectively were known as "cabildo ordinario" (ordinary assembly).

These officials—direct political ancestors of our assemblymen—were both appointed and elected but their governing activity was exercised collectively. They followed the principle of *co-responsibility* in government.

The appointed officials were chosen by the crown. But they *were not agents* of the crown. They acted for the municipality which in turn governed itself thru a charter, so strong and independent, that, in many a case, it eventually came to serve as the juridical basis for the independence movements in Spanish-America (v. gr. Caracas, Buenos Aires).

The main "cabildos" those of the principal cities of the different regions—the region could be a province or one of the American Kingdoms of the Spanish

Crown—had a double function. One was strictly municipal and according to law, the other regional and circumstantial. The latter was an outgrowth of the relative importance of city life to the region.

The Municipal Assembly of San Juan clearly relates to this legal tradition. The assemblymen elected by the people parallels the upward selection of the Cabildo's representatives. Those appointed by the Governor follow the second historical method. On the rationale of this tradition it follows that the appointees came into their positions not as an agent of the central government but as municipal factotums although subsidiarily related to the central government in so far as the city carried weight in the life of the province.

Searching through centuries of historical background the specialists fail to find a single significant case in which the appointed members of the "cabildo" felt themselves to be crown agents. They were municipal functionaries, first and all, with their legal roots and power in the municipal charter. Their predominance outside the city and over the regional was circumstantial, resting on the relative importance of the city over the life of the region.[7]

And since the change of sovereignty in 1898, the broad power of the Legislature to determine how to govern the municipalities goes all the way back to the

[7] See José M. Ots, "Historia del Derecho Español en America y Del Derecho Indiano"; José M. Ots, "El Estado Español en las Indias"; Salvador de Madariago, "El Auge del Imperio Español en Americas"; Salvador de Madariago, "Bolivar"; Ricardo Laverne, "Las Indias no eran Colonias"; Carlos Pereyra, "Obras Completas"; Revista de Occidente, "Diccionario de la Historia de Espana" (Municipios). We cited the Spanish version of these works.

Organic Act of 1900. Article 32 of said Act provided, insofar as pertinent, that the legislative authority extended to the power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor.[8] Said disposition was maintained on Article 37 of the Organic Act of 1917. See in this respect, *Chapel* v. *Municipal Assembly,* 49 P.R.R. 591 (1936); *Sánchez* v. *Municipality of Cayey,* 94 P.R.R. 89 (1967). The above principle was expressly reiterated by the Constitutional convention when it approved Article VI, section 6 of the Constitution of the Commonwealth of Puerto Rico.

In line with its capacity to determine the organization and functions of the municipalities, the Legislature adopted the predecessor of the present system in 1931. Article 9 of Law Number 99 of 1931 provided that all five members of the Board of Commissioners of San Juan would be appointed by the Governor, with the advice and consent of the Senate (Laws, p. 632). The law was further amended to provide for the appointment of some of the members and the election of others. Law Number 10 of March 24, 1937, (Laws, p. 132) and Law Number 210 of May 4, 1951 (Laws, Sec. 9 at p. 590). In 1960 the Legislature enacted an entirely new Municipal Law (Law Number 142, approved on July 21, 1960). By virtue of section number 10 of said law, the system now attacked was established. 21 L.P.R.A. 1152(b). The reasoning which served as basis for the combination of appointed and elected members of the Municipal Assembly of San Juan was explained by the Majority Leader of the Senate as follows:

> "Now the decision has been that there be, in the municipality of San Juan, where the country's

[8] Laws of Puerto Rico Annotated, Vol. I, p. 43 (1965 ed.).

general interests are represented, an indirect intervention by the collective will of the people, in some specific form, by determining the style in which its government shall be constituted.

If we think, Mr. Chairman, that the Capital does not belong only to a municipality or the inhabitants thereof, but to the whole country, there is enough justification for the approval of this measure.

If we think, Mr. Chairman, that the general fund of the country has to invest here copious amounts of money for the port development, that belongs to all of Puerto Rico, for the University facilities which belong to all of Puerto Rico, for the large traffic arteries needed for the economic progress of this country, for banking, for industry, for the moving control of this country throughout the developing process and growth thereof, and its life itself, there are sufficient reasons to have a voice from all the Puerto Rican citizenry even though tinily represented, to be heard in regard to the manner in which the San Juan municipality is governed. That, independently of all the reasons appertaining to a good Government, meaning the phrase 'good Government'—and I don't wish to be interpreted and quoted as saying a kind Government because I am talking about something totally different—of all the achievements to be had through good Government when there is the possibility to manage a community of the size and the special and peculiar problems that San Juan has, in the manner that has been demonstrated, so successfully in the past". Diario de Sesiones, Vol. XIII, Tomo 4, page 1715.

For a state court analysis of similar situations, see *People ex rel Younger* v. *County of El Dorado,* 96 Cal. Rptr. 553, 570, 487 P.2d 1193, 1210 (1971). See also *Brown* v. *City of Galveston,* 75 S.W. 488 (S.C. Texas) which upholds the power of the Governor to appoint

the officers of the municipal assembly of Galveston, cited with approval in *Austin* v. *Welch,* 480 S.W.2d 273 (1972).

All of the above clearly demonstrates that the Legislature of Puerto Rico had a reasonable basis for the different treatment given to the Capital of Puerto Rico. And the system adopted, that is appointment of some of the members by the Governor with the advice and consent of the Senate, clearly tends to implement the policy. The appointed members have a voice and vote in the Assembly to carry out their functions. No showing has been made by plaintiffs or by the Court below that the system does result in an invidious discrimination which violates their constitutional rights.

But assuming that the Court analysis is correct and that the compelling state interest criteria was correctly applied, we submit that the conclusions reached are erroneous. If finds that the scheme is improperly tailored for its legitimate objective. Granted that the objective is legitimate and that a compelling state interest is present, as the Court accepts it, it becomes a matter of differences of opinions between the judiciary and the legislative powers. It is beyond argument that the judicial role should not be so extensive as to substitute its judgment for that of the legislature. As held in *Mahan* v. *Howell, supra,* a reapportionment case, more flexibility is allotted the states as to the manner the governmental functions and bodies are instrumented, so that the inquiry then becomes whether it can be reasonably said that the state policy is indeed furthered by the plan adopted by the legislature. The lower Court might have suggested a better or more convenient manner of governing the city of San Juan but that is strictly a question of opinion. The Commonwealth had

to make a choice between the different alternatives open to it. Its judgment should be given great weight.

As to the Court position that section 1152 dilutes or affects the majority vote of the citizens of San Juan, we submit that the decision in *Gordon* v. *Lance, supra,* is controlling. The issue in that case was whether a 60% favorable vote requirement in order to incur public debt or increase the tax rates violated the Fourteenth Amendment Equal Protection Clause. A proposal was defeated in spite of the fact that 51.51% of the voters favored it. The Supreme Court held that *Gray* v. *Sanders,* 372 U.S. 368 (1963) (a one person-one vote case) and *Cipriano* v. *City of Houston, supra,* (a voting rights case) were not applicable. The court expressed, in words directly applicable to this case, insofar as petitioner reliance in *Gray, Cipriano* and similar cases, that:

> "We conclude that the West Virginia court's reliance on the Gray and Cipriano cases was misplaced. The defect this Court found in those cases lay in the denial or dilution of voting power because of group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election; moreover, the dilution or denial was imposed irrespective of how members of those groups actually voted.
>
> Thus in Gray, supra, at 381 n. 12, 9 L.Ed.2d at 831, we held that the county-unit system would have been defective even if unit votes were allocated strictly in proportion to population. We noted that if a candidate received 60% of the votes cast in a particular county he would receive that county's entire unit vote, the 40% cast for the other candidate being discarded. The defect, however, continued to be geographic discrimination.

> Votes for the losing candidates were discarded solely because of the county where the votes were cast. Indeed, votes for the winning candidate in a county were likewise devalued, because all marginal votes for him would be discarded and would have no impact on the state-wide total.
>
> Cipriano was no more than a reassertion of the principle, consistently recognized, that an individual may not be denied access to the ballot because of some extraneous condition, such as race, e.g., Gomillion v. Lightfoot, 364 U.S. 339, 5 L.Ed.2d 110, 81 S.Ct. 125 (1960); wealth, e.g., Harper v. Virginia Board of Elections, 383 U.S. 663, 16 L. Ed.2d 169, 86 S.Ct. 1079 (1966); tax status, e.g., Kramer v. Union Free School Dist., 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969); or military status, e.g., Carrington v. Rash, 380 U.S. 89, 13 L.Ed.2d 675, 85 S.Ct. 775 (1965)".

As to the majority or minority of the votes arguments, it held that:

> "Although West Virginia has not denied any group access to the ballot, it has indeed made it more difficult for some kinds of governmental actions to be taken. Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate we have found no constitutional barrier to the selection of a governor by a state legislature, after no candidate received a majority of the popular vote. Fortson v. Morris, 385 U.S. 231, 17 L.Ed.2d 330, 87 S.Ct. 446 (1966)".

The court did not express any opinion as to the wisdom of the system. That, of course, is not the court's role. *Dandridge* v. *Williams,* 397 U.S. 471 (1972).

We submit that neither is there a constitutional barrier to the appointment by the Governor of part of the assemblymen of San Juan in order to safeguard the substantial interest which all the citizens of Puerto Rico have in the affairs of its Capital City. The deference allotted to the Commonwealth by Congress and this Honorable Court, *Fornaris* and *Calero-Toledo, supra,* clearly warrants that the validity of a statute dealing only with strictly local matters be upheld.

We also submit that the alleged dilution of the votes and/or infringement of the voting rights of the majority of the voters in San Juan, is far less drastic than the one considered by the Supreme Court of Puerto Rico and this Honorable Court in the case of *Cerezo* v. *Busó,* No. 74-413, Appeal dismissed for want of a substantial question, January 13, 1975, 42 L.Ed.2d 795. The question presented in that case was summarized in 43 LW 3336 as follows:

> "Do Section 89(A) of Puerto Rico Electoral Law and Article III, Section 7 of Puerto Rico Constitution abridge freedom of association and equal protection of laws in violation of First, Fifth and Fourteenth Amendments by compelling certification as elected of candidate who has obtained less votes than another candidate for same elective position if former belongs to minority party that has obtained more than 5 percent of votes for Governor in election?

In that case a candidate who received close to 150 votes was declared elected to the Commonwealth Legislature over one who received over 50,000 votes. The

local Court held that the statutory scheme did not violate the one person-one vote doctrine nor did it infringe upon the voting rights of those who voted for the candidate with more votes. If under that situation, no substantial federal question was found to be present, it is evident that the same is also true herein, where the weight of the votes is only indirectly affected and the legislative body is purely local.

IV. Whether the Permanent Injunction Judgment Restraining Defendants From Acting Pursuant to the Statute Is Justified Under the Specific Circumstances of This Case.

In order to grant injunctions, the Court must find that plaintiffs have shown irreparable injury, "the traditional prerequisite for obtaining an injunction in any case". *Allee* v. *Medrano,* — U.S. —, 40 L.Ed.2d 566, 581, 94 S.Ct. 2191 (1974).

In its April 3, 1975 Judgment the Court made such a finding of irreparable injury. But we submit that the injunction is too broad. An analysis of the prior opinion clearly shows that the main defect found in the statute is that a minority of the voters of San Juan might in the future gain a majority of the members of the assembly. That situation is not present now. Thus the Court should have issued a limited injunctive order in accordance with the equitable principles involved. That is, an injunction restraining the Governor from enforcing the statute in the elections to be held in 1976 would have been sufficient to protect plaintiffs rights found to have been deprived. This is true even if the Court made an ancillary finding that the rights of association are affected by the statute. The injunction proposed by us would clearly safeguard these rights in future elections.

Thus we submit that the injunction order goes beyond the equitable powers of the Court and the requisites of Rule 65 of Rules of Civil Procedure.

CONCLUSION

Appellants submit that all the questions presented are of such importance that they warrant plenary consideration by the Court with briefs on the merits and oral arguments.

San Juan, Puerto Rico, June 3, 1975

MIRIAM NAVEIRA DE RODON
Solicitor General

PETER ORTIZ
Deputy Solicitor General

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 8-73

CIVIL ACTION

GERMAN ORTIZ, NORMA S. GOMEZ and VICENTE V. TORRES,
Plaintiffs

vs.

HON. RAFAEL HERNANDEZ COLON, GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO; and LUIS MUNOZ RIVERA, TOMAS TORRES NAVEIRO, SIXTO PACHECO, LYDIA PUIG and DAINE ROJO, *Defendants*

Amended and Supplemental Complaint

NOW COME plaintiffs herein, by their undersigned attorneys, and for their complaint against the Hon. Rafael Hernandez Colon, Governor of the Commonwealth of Puerto Rico, defendants herein respectfully allege:

1. Plaintiffs are citizens of the United States of America and all are residents of the Municipality of San Juan, Puerto Rico, and registered voters therein.

2. Plaintiffs bring this action on behalf of themselves and as representatives of the entire class of registered voters of the Commonwealth of Puerto Rico who are also residents of the Municipality of San Juan.

3. All the prerequisites to a class action are met and a class action is maintainable pursuant to the provisions of 28 U.S.C.A. Rules of Federal Procedure, Rule 23(a), Rule 23(b).

4. Defendant, Hon. Rafael Hernández Colón, is the Governor of the Commonwealth of Puerto Rico.

5. On January 8, 1973, this Honorable Court entered its decree and order declining to convene a three-judge statutory court pursuant to Section 2284 of Title 28 of the United States Code.

6. Immediately thereafter, the Hon. Rafael Hernández Colón, Governor of the Commonwealth of Puerto Rico named the other named defendants as Municipal Assemblymen of the Municipal Assembly of the Municipality of San Juan.

7. Said appointments were made pursuant to the provisions of Section 1152 of Title 21 of the Laws of Puerto Rico Annotated which provides as follows:

> Section 1152. Number of Members.
>
> (a) Generally. The municipal assembly shall be composed of sixteen (16) members in municipalities whose population, in accordance with the last decennial census, is or exceeds forty thousand (40,000); fourteen (14) in municipalities whose population is or exceeds twenty thousand (20,000); and twelve (12) in all other municipalities, with the exception of San Juan and Culebra whose municipal assemblies shall consist of seventeen (17) and five (5) members, respectively.
>
> (b) Special provision for San Juan. The Municipal Assembly of San Juan shall be composed of seventeen (17) members. Twelve (12) of these seventeen (17) members shall be elected at each general election by the qualified voters of San Juan and the other five (5) shall be appointed by the Governor with the advice and consent of the Senate. No political party may nominate and elect more than nine (9) members.

8. The aforesaid statute of the Commonwealth of Puerto Rico is unconstitutional under the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States in that it deprives the plaintiffs and all the members of the class they represent of the equal protection of the laws.

9. Unless a temporary restraining order is immediately issued, the defendants, Assemblymen, will proceed to act in their official capacities even though not elected, depriving the plaintiffs and the class they represent of the rights, privileges or immunities secured by the Constitution and the laws of the United States.

10. This Honorable Court has jurisdiction over the parties and subject matter of his litigation pursuant to the Fifth Amendment and Fourteenth Amendment of the Constitution of the United States; Title 42, of the United States Code, Section 1983; Title 28 of the United States Code, Section 1343 (3); Title 28 of the United States Code, Sections 2201 and 2202; Title 28 of the United States Code, Sections 2281 and 2284.

11. The fundamental principle of representation government in the United States is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.

12. The people who reside in the Municipality of San Juan are not permitted to elect their local legislators on a population principle.

13. The people who reside in the Municipality of San Juan are permitted less assemblymen than the other municipalities in the Commonwealth of Puerto Rico on a proportional basis, thus they are the victims of an arbitrary, invidious and unjustifiable discrimination.

14. The people who reside in San Juan are not permitted to vote for all of their Municipal Assemblymen, thus their vote is diluted compared to the other residents of the Commonwealth of Puerto Rico.

15. The residents of the other Municipalities of the Commonwealth of Puerto Rico influence and control the legislative Municipal Assembly of San Juan, thereby depriving the residents of the Municipality of San Juan of the equal protection of the laws.

16. The statute unconstitutionally authorizes the Governor of Puerto Rico to appoint legislators for the Municipality of San Juan, thereby depriving the citizens and residents of the Municipality of San Juan of their right to vote for all the members of their legislative assembly.

17. In depriving the citizens and residents of San Juan of their right to elect all of their legislators and in granting the right to the Governor to name some of said municipal legislators, by the terms of the aforesaid statute, the Legislature of Puerto Rico has made an unconstitutional delegation of legislative power to the executive, and has impaired the plaintiff's and the class they represent, of the equal protection of the laws.

WHEREFORE, plaintiffs respectively pray:

A. That this Honorable Court decree that this action be maintained as a Class Action pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, Title 28, United States Code.

B. That this Honorable Court decree that a substantial Constitutional issue exists herein requiring the convening of a statutory court of three judges pursuant to Title 28, United States Code, Section 2284, for the purpose of hearing and determining this cause.

C. That a three judge statutory Court be convened.

D. That Section 1152 of Title 21 of the Laws of Puerto Rico Annotated be adjudged and declared to be in violation of the Constitution of the United States, and therefore void, as said statute applies to the Municipality of San Juan.

E. Issue a preliminary and permanent injunction:

(1) Restraining and preventing the defendants, Assemblymen, from performing any act in their official capacity as assemblymen.

(2) Directing the twelve (12) elected Assemblymen of the Municipal Assembly of San Juan to act as duly constituted Municipal Assembly of San Juan and directing them that a quorum shall be composed of seven (7) elected Assemblymen and that eight (8) Assemblymen shall constitute a two-thirds majority until a new statute is validly enacted.

(3) Grant plaintiffs such other and further relief as may be just and proper and in accordance with the Constitution and laws of the United States.

San Juan, Puerto Rico, on this 8th day of January, 1973.

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/s/ Harvey B. Nachman
HARVEY B. NACHMAN

APPENDIX B

(Caption Omitted in Printing)

Opinion and Ruling of the Court

BE IT REMEMBERED that the above entitled matter came on to be heard for an announcement to be made, before the HONORABLE HIRAM R. CANCIO, Chief Judge, United States District Court for the District of Puerto Rico, pursuant to the adjournment taken on January 5, 1973.

THEREUPON, at 9:00 in the morning on January 8, 1973, the following proceedings were had:

* * * * * * * * * *

This court, acting through a single judge, must now go into the merits of the plaintiffs' contentions. We must, of necessity, be brief, stating only the general grounds for our decision, without the expression of the extense legal reasoning usually contained in this type of opinions. That we do not do so does not mean that we have not fully weighed all the points brought up by the parties, but rather, that we can only discuss them briefly in order to decide this matter this morning as we had promised.

The Secretary of Justice of the Commonwealth of Puerto Rico insists on his contention that, even though federal rights may be at stake, this federal court should abstain from entertaining the constitutional question raised by the plaintiffs, deferring the matter rather to the local courts. We do not agree.

If it were not enough to say that the existence of the Puerto Rico Anti-Injunction Act and the absence of adequate local remedies make abstention improper,—I should add here in the absence of local remedies, together with the fact that there is no need to make an interpretation of the law by the local court, make abstention improper, it would suffice to say that the law whose validity is being attacked is so clear that it leaves no room for interpre-

tation by local courts, making inexistent the need for the application of the abstention doctrine. I notice now that what I added, which wasn't in my handwriting, was contained at the end of the paragraph. Nevertheless, since this is not a formal opinion, "lo que abunda no daña."

We fail to see how, by any stretch of the imagination, a Commonwealth court could interpret the statute in question in a manner which would not empower the Governor to appoint five members to the Municipal Assembly of San Juan.

Just a few months ago in the case of *Rolando Santín Arias* v. *Board of Examiners*, Civil Case 264-72; this is a case of the refrigeration mechanics, a three-judge court presided by Chief Judge Coffin, and in which Judge Toledo and myself sat, disposed of the question in the following manner. I quote from this opinion:

"Another preliminary issue raised by the defendants is the applicability of the doctrine of abstention in this case. Since its expression in the case of *Railroad Commission* v. *Pullman Company*, 312 U.S. 496 (1941), it has been well settled that the doctrine is applicable only when the state court construction of the state law in question may obviate the need for a decision on the federal constitutional issues. Thus, some degree of uncertainty and the possibility of variance in the interpretation of the statute must be present to justify the abstention of a federal court. The doctrine is not properly invoked when the purpose is to have the local courts test the validity of the statute in the light of the federal constitutional claims. Its purpose is to allow the state or Commonwealth courts to interpret the statute in the light of the federal claim, so that a decision on federal constitutional grounds might be avoided."

Then there is a part of the opinion I am omitting, and it continues like this:

"That is not the case here. We fail to see any conceivable way in which the Commonwealth courts can construe Section 9(c) of the statute to avoid the constitutional issues raised in this case. Consequently, abstention is not warranted here."

The doctrine of abstention not being applicable to this situation, we must dispose of the problem related with the constitutionality of the Commonwealth law here in issue.

The only alleged infirmity of the law, according to the plaintiffs, is that while it provides for wholly elected municipal assemblies in all other municipalities of Puerto Rico, 5 of the 17 members of this legislative body of the City of San Juan, the Capital, are not elected but appointed by Commonwealth authorities, to wit, the Governor and the Senate. This difference, it is contended, negates the equal protection of the law and violates the Fifth and Fourteenth Amendments of the Constitution of the United States.

The San Juan voters are given a treatment different from that of the rest of the municipalities. This by itself is not sufficient to make us conclude that we are in the presence of a denial of the equal protection of the laws. But, it is further argued that, on account of such different treatment, the San Juan voters, not being allowed to elect all the members of their Municipal Assembly, are not permitted to exercise its full electoral franchise or, to use the words borrowed by the plaintiffs from a very well known line of cases, beginning with *Baker* v. *Carr,* 369 U.S. 186 (1962), violates the principle of "one man, one vote." In other words, they claim that there has been a dilution of their right to an equal vote. We fail to see how.

No racial, religious or other kind of class discrimination is alleged to exist among the voters of San Juan;

that is, within the geographical boundaries of this municipality. The alleged invidious discrimination is between all voters of San Juan, considered as a whole (including all races, religions, and every conceivable group or class), and all voters of each and all other municipalities, also considered, each or all of them, as a whole. The distinction between the two lies, really, on the degree of direct participation in the selection of some of their assemblymen that each of them possesses.

It is undisputed, the parties so agree, and we need not quote from the corresponding reports and debates found in the legislative records of the Constitutional Convention which in 1952 led to the creation of the Commonwealth of Puerto Rico, that the Puerto Rican municipalities follow the same pattern and are governed by the same rules as the municipalities of all the States of the Union. At least as early as 1907 it became clear that these political subdivisions of the State are not sovereign entities but are merely creatures of the State, which may determine their powers and limitations. The case of *Hunter* v. *City of Pittsburgh,* 207 U.S. 161, decided in that year, made it clear that "the number, nature and duration of the powers conferred upon (the municipalities) . . . rests in the absolute discretion of the state."

It is interesting to note *en passant* that perhaps the only difference between the Puerto Rico and the typical state's municipalities is that Article VI of the Constitution of Puerto Rico, after enumerating the broad powers of the Commonwealth over the municipalities—it is there empowered to create and abolish, adds that no law abolishing or consolidating municipalities shall take effect until ratified in referendum by the municipalities to be affected. This limitation, though, has no bearing on the case at bar.

The broad statement mentioned before this parenthetical thought has been made less absolute in subsequent decisions, especially when the state power vested on the

municipalities is used to, or has the effect of circumventing federally protected rights having to do with questions such as race, such as the case of *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960); economic conditions of voters, I quote *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 decided in 1966; military status of voters, I cite *Carrington* v. *Rash,* 380 U.S. 89, (1965); and similar situations in which other voting discriminations repugnant to the Constitution are made by the state legislatures. We have failed to find a single case, and the parties have been unable to show us any, in which the different treatment given by the state to different political subdivisions has been considered by any court as a basis for finding that the law is unconstitutional.

Plaintiffs seem to rely greatly on *Avery* v. *Midland County, Texas,* 390 U.S. 474 (1968), which they quote correctly as stating that municipalities must comply with the Fourteenth Amendment, and that the actions of local government are the actions of the State. We may add now, to be more specific, that a municipality may no more deny the equal protection of the laws than its creator, the State.

But, there is no single averment that the municipality of San Juan has acted in any manner as to adversely affect any rights, privileges or immunities of its voters. If anything was done, it was done by the state, in our case the Commonwealth. And plaintiffs have failed to convince us that in the exercise of its broad powers regarding the municipalities, the Commonwealth has invidiously infringed upon the electoral franchise of the voters of San Juan.

The legislators chose a special kind of municipal assembly for a special kind of a municipality, the Capital, where the central government and all the corporate instrumentalities and other state facilities are located. If the legislators did not make a wise decision in selecting the present method of constituting the municipal legislative power, if they did not choose a still more democratic method of electing the assembly, it is to them, and not to this court that the plaintiffs and the class they purport to represent must go to seek relief. They have not shown us that the Municipality of San Juan has not conformed to the one man, one vote, principle.

In view of the foregoing, we will not enjoin in any manner the Governor of the Commonwealth of Puerto Rico, and he may feel free to appoint the five members of the Municipal Assembly of San Juan, in furtherance of Section 1152 of Title 21 of the Laws of Puerto Rico Annotated.

Therefore, the complaint and all accompanying motions filed by the plaintiffs on January 3, 1973 shall be, and are hereby, denied.

One last word we must say for the protection of any rights that plaintiffs may have and we may have overlooked. Even though we have expressed that this is not a formal opinion and that a more elaborate one may be issued at a later date, the Court wishes to announce that the action taken today shall be considered a final order, and that judgment shall be entered accordingly. This will allow plaintiffs to file a notice of appeal immediately thereafter, if they so wish.

The Court also wishes to announce that if the plaintiffs feel that the appointment of the assemblymen by the Governor today tenders the case moot and they think there is no way to appeal, the Court is amenable to entertain an amendment to the complaint, or a new one, which will be decided in the same manner as this one, and will allow them to take an appeal if so desired.

Even though I think it is implied in these last words, I have in mind the fact that the prayers in this case call for enjoining the Governor from appointing the assemblymen, and since I am not enjoining him, if he goes ahead

and appoints them this morning, then the prayer and the complaint becomes moot. But the complaint may be amended, or perhaps if you study the points and you feel you have to file a new complaint asking that the persons appointed by the Governor be removed from their positions, the Court is amenable to entertain such an amendment, or to entertain such new complaint, to dismiss it, and to allow the plaintiffs to seek relief from the Court of Appeals as soon as possible.

Is there anything that the parties would like to inform the Court?

MR. NACHMAN: Yes, Your Honor. First, we would like to move the Court to reconsider the last part of its opinion, decided on the merits, that the statute is constitutional. The Court reasons from *Hunter,* that the state has broad powers to determine the type and action of its municipalities or other political subdivisions, and finds no denial of equal protection in a half-appointed, half-elected municipal assembly.

THE COURT: To make it more exact, five-seventeenths.

MR. NACHMAN: By half, I mean part, Your Honor. That issue we believe has been already decided by the Supreme Court of the United States in the line of cases starting with *Sailors* v. *Board of Education of County of Kent,* 387 U.S. 105. In that case the administrative functions as distinguished from the legislative functions of the county were by an appointed Board. The Supreme Court held that the appointed Board could be so constituted, as long as it had no legislative functions.

In the later case of *Hadley* v. *Junior College District of Metropolitan Kansas City, Missouri,* 397 U.S. (1970), the Supreme Court reiterated its statement of *Sailors,* that the state government had broad powers of experimentation with political subdivisions. But once a State has decided to use the system of popular election——

THE COURT: Once the state has decided to use the process of popular election. In this case, the state has not decided to use it, but to use a combination of popular election and appointment.

MR. NACHMAN: "——once the class of voters is chosen and their qualification specified, we see no constitutional way by which equality of voting power may be evaded." Now,——

THE COURT: Isn't that in the context of the case referring to the voters within the district of that county or municipality?

MR. NACHMAN: In this case, Your Honor, there is something else. Since a two-thirds majority is needed for much of the legislation of San Juan for appropriations, for bond issues, for contracts with the federal government, for over-riding a veto of the mayor, we have here a situation where the people of San Juan are not, in effect, electing their municipal assembly, and what the Legislature has improperly done—it delegated a legislative function to the Governor of Puerto Rico, the appointees are beholden only to the Governor. If the Legislature of Puerto Rico said, "We don't want any Municipal Assembly of San Juan; we will have a Board of Aldermen who will administer San Juan,——

THE COURT: A Board of what?

MR. NACHMAN: Aldermen, or whatever name they give them. They could do that as long as that Legislature retained the legislative power, but they can not delegate their legislative power, which they have from the people, and give it to the executive power, and that's what has happened in this case. So the voters in San Juan, it is true they have all had their vote diluted, but they have had it diluted in comparison with all the other municipalities of Puerto Rico, who all have a direct and deciding voice in the City of San Juan, to which they pay no

taxes, owe no allegiance, and are not concerned in terms of representative democracy.

So, we ask the Court to reconsider on the basis of just these two cases—these three cases, *Sailors* v. *Board of Education, Dusch* v. *Davis,* and *Hadley* v. *Junior College District;* and should the Court not reconsider, we respectfully request that a stay be granted by the Court under Rule 62(a), to permit us to take an immediate appeal to the United States Court of Appeals for the First Circuit, so that the appeal can be expedited under local Rule 5 of the Rules for the Court of Appeals.

THE COURT: I would like to hear the Government on this, if they are ready.

MR. ORTIZ: As to the first part of plaintiffs' argument, we believe it rather goes to the wisdom of the statute involved, than to the constitutionality, whether the appointment of these five members is a precise and well executed matter of policy.

In our brief we cited various cases which stated, as the Court said, that the municipalities are creatures of the state, and the state legislature can delegate its powers to the executive and administrative, not only to the municipalities, but to a wide spectrum of the Commonwealth.

As to the petition for stay, we oppose it most vehemently because if a stay is granted, then they will indirectly obtain what they could not obtain directly. With those considerations we submit our position.

MR. NACHMAN: May I say one word about the stay? I understand there is no scheduled business meeting of the Municipal Assembly, and was so informed by co-counsel this morning, other than the formal swearing-in and election of officers of the Municipal Assembly, for—how long is it?

MR. DUBON: Until next month, Your Honor. After today's meeting at which time they will only elect officers and be sworn in, no other business meeting is scheduled until the first Monday in February. I was so informed.

THE COURT: Mr. Nachman, even though I am going to have a short recess in a few minutes to re-read these cases you mentioned regarding the merits of the controversy, I would like to hear you on the stay, and the possibility, if I don't grant your reconsideration, wouldn't what I stated at the end of my ruling, that I would be amenable to entertain this amendment or a new complaint and deny it immediately, be equally rapid?

MR. NACHMAN: I have been sitting up all night thinking about that. I don't think so. If five people are sworn in, and it is later determined that they were illegal or unconstitutional, certainly any action taken by the legislature, the Municipal Assembly would be *de facto* legal.

THE COURT: What they do between that moment, and the moment that they are declared to be——

MR. NACHMAN: Illegally seated.

THE COURT: ——is legal, because they are there *de facto.* Yes.

MR. NACHMAN: However, there would be all kinds of problems created, both in terms, I suppose of salaries, functions, and everything else, and no harm could be done to the Commonwealth of Puerto Rico or the Municipal Assembly if there is, in fact, no business to be taken before the Municipal Assembly until the first Monday in February. Because the Court of Appeals will be meeting here on that date, and it would, at most, mean a delay of one or two days from their scheduled meeting in February, their business meeting in February, and would obviate the necessity of enjoining people to take seats or create any ill will which we wish to avoid.

I can see my colleague is right. It would have, in all, the same effect as an injunction, but only for the limited purpose of the appeal.

THE COURT: The Court will have a short recess. I suggest the parties either remain in the court room or in the corridors near the court room, and I will be back as soon as I re-read these cases. The Court will be in recess.

(A short recess was then had.)

THE COURT: During this short recess the Court has been reviewing—re-reading and reviewing the cases mentioned by Mr. Nachman. I will refer now only to the case of *Sailors* v. *Board of Education,* 387 U.S. 105, and specifically to page 108 of the United States Reports where the language quoted by Mr. Nachman is found. The language cited by him, or part of it, reads like this:

"We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."

This seems to imply that when the Supreme Court states that the nonlegislative officers may be appointed and not elected it is saying, *mutatis mutandis,* that the legislative must be elected and not appointed. If it is read out of context, that is exactly what it may suggest. If we keep on reading, immediately after that the Court says:

"Our cases have, in the main, dealt with elections for United States Senator or Congressmen (citing cases) or for state officers (citing cases) or for state legislators (citing cases)." They were all cases where elections had been provided and cast no light on when a State must provide for the election of local officials. A State cannot of course manipulate its political subdivisions so as to defeat a federally protected right, as for example, by realigning political subdivisions so as to deny a person his vote because of race."

This also seems to imply two things: that the previous cases which have been dealing only with state officials suggest that when non-state officials are involved they may be appointed instead of elected, even though they are legislative in nature; and also suggests, or really states, that this is a problem of discrimination as to the manipulation of the political subdivisions to defeat federally protected rights such as race, religion, and what not.

But, the point which is really in issue in this case at bar is expressly left undecided by the Supreme Court, when at page 109, it states:

"The Michigan system for selecting members of the county school board is basically appointive rather than elective. We need not decide at the present time whether a State may constitute a local legislative body through the appointive rather than the elective process. We reserve that question for other cases such as *Board of Supervisors* v. *Bianchi, ante,* page 97, which we have disposed of on jurisdictional grounds."

That is to say, they disposed of that case on jurisdictional grounds, and never reached that point. Keeping on with the quote:

"We do not have that question here, as the County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense."

I ask now whether, after this case, the Court has decided the case on all four's in which this problem is presented?

MR. NACHMAN: Your Honor, on the same day *Sailors* was decided, they decided *Dusch* v. *Davis.* In that case, it is not on all four's but they decided the principle of *Reynolds* v. *Sims* applied to local government, which was still left open in *Sailors.* Three years later they decided *Hadley* v. *Junior College.* I have found no case on all four's. The only case that is close to all four's is the case

of *Oliver* v. *Board of Education of City of New York,* which was a District Court case, and I think it is cited in our brief.

THE COURT: Yes, I think it is.

MR. NACHMAN: And in that case the Board of Education of New York was composed of seven members, five of whom were elected by each borough and two were appointed by the mayor of New York City.

THE COURT: By the mayor, not by the governor.

MR. NACHMAN: And the Board of Education did have legislative functions, tax levies and other things, and they never reached the issue of whether or not the mayor could appoint two, because since each borough elected only one, and Kings had 2½ million people, and Staten Island had 200,000, obviously the voting value of the Staten Island resident was ten times higher than the vote which the resident of Brooklyn had, and they wiped out the statute without raising the second issue. I have found no other cases except *Hadley*.

THE COURT: That's my problem, and I had to decide it myself, and I decided on the constitutionality of the law. I see no reason to change my ruling. The motion for reconsideration is hereby denied. The motion to stay, due to the fact that it amounts to an injunction, since today is the day on which the Governor may appoint the members of the assembly, is also denied.

I reiterate my offer to the parties, to entertain any amendment to the present complaint, or any new complaint. You know how I think about the matter, it is just to argue the right to appeal. I must confess I am trying to leave the office as soon as possible, and try to get some sleep, but when you are ready, I will be ready.

APPENDIX C

(Caption Omitted in Printing)

Opinion

COFFIN, *Circuit Judge.* Plaintiffs, on behalf of themselves and all the registered voters of the Commonwealth of Puerto Rico who reside within San Juan, seek to enjoin five assemblymen within the San Juan Municipal Assembly, appointed by the Governor of Puerto Rico, from performing their official acts. They also seek a declaratory judgment that L.P.R.A., tit. 21, § 1152(b), which authorizes such appointments, unconstitutionally deprives the citizens of San Juan of the equal protection of the laws, under the principle of "one-person, one-vote."[1] This case comes to us on remand from the Court of Appeals which vacated the judgment of the District Court, denying plaintiffs' request for a three judge court. *Ortiz* v. *Colon,* No. 73-1017, March 28, 1973.

The facts are simple and uncontested. San Juan, capital city of the Commonwealth, contains approximately twenty-five per cent of the island's population. The statutory scheme for the composition of the Municipal Assembly of San Juan provides for twelve elected assemblymen and five additional assemblymen appointed by the Governor. Legislation before the Municipal Assembly normally re-

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[1] While the policy announced in *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970) would, perhaps, have us wait until the Commonwealth's own courts had had opportunity to confine the statute so as to avoid constitutional infirmity, we think *Fornaris* is inapplicable where, as in the present case, the statute states precisely that "The Municipal Asembly of San Juan shall be composed of seventeen (17) members, twelve (12) of [whom] shall be elected at each general election by the qualified voters of San Juan and the other five (5) shall be appointed by the Governor with the advice and consent of the Senate. . . .", and is therefore subject to only one reasonable interpretation. Nor was *Fornaris* raised by either of the parties.

quires approval by a majority of the assemblymen, although important legislation, such as the issuance of bonds or the entering into contracts with the federal government, requires a two-thirds majority.

At the outset, we fully recognize that local governments require flexibility and room for innovation if they are to meet complex urban problems which are increasingly regional in character. *See Abate* v. *Mundt*, 403 U.S. 182 (1971); *Sailors* v. *Board of Education*, 387 U.S. 105 (1966). "To stay experimentation in things social and economic is a grave responsibility." *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting). City boundaries often fail to reflect the economic and social interdependence of larger municipal regions. Political decisions within one local jurisdiction often have a direct impact upon other local jurisdictions within the same area, since the jurisdictional boundaries hail from a simpler era when distinct communities had their own distinct concerns. In short, the modern megalopolis, straddling cities, suburbs, and rural countryside, requires new forms of government which are responsive to a larger, more complicated, and more varied constituency. *See Dusch* v. *Davis*, 387 U.S. 112, 117 (1966). State governments have already begun to experiment with regional government in the form of metropolitan planning councils, regional transportation authorities, and associations of local governments, whose members are either appointed directly by the legislature or the governor or elected, pyramid-style, by the elected representatives of local communities.[2] We also give full

[2] Among the most pronounced examples are (1) Minnesota's Twin Cities Metropolitan Council, which has jurisdiction over Minneapolis, St. Paul, and the seven-county area surrounding them. It was created, in part, to meet federal requirements that applications for loans and grants under approximately thirty-nine separate federal programs be administered by an agency having responsibility for metropolitan planning. Its fifteen members are all appointed by the Governor. (2) New York's metropolitan region, covering parts of three states, is administered by several regional authorities, among them the Metropolitan Transportation Authority, the Port of New York Authority, the Interstate Sanitation Commission, and the Tri-State Transportation Commission. Members of all these authorities are appointed by the three governors. (3) San Francisso Bay's Association of Bay Area Governments (ABAG) has general responsibility for the planning and development of regional transportation and industry in the Bay area. The association is comprised of representatives, elected pyramid-style, from 625 local governmental units, including San Francisco, Oakland, and San Jose. *See generally*, Jones, *Metropolitan Detente: Is It Politically and Constitutionally Possible?* 36 Geo. Wash. L. Rev. 741 (1968).

deference to the traditional doctrine that municipal governments are mere "instrumentalities" of the states, created as convenient agencies for the exercise of such of the government powers of the states as may be entrusted to them, and that the extent of their powers and the extent of their territories rest in the absolute discretion of the states. *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964); *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178 (1907); *Padron* v. *People of Puerto Rico*, 142 F.2d 508, *cert. denied*, 323 U.S. 791 (1944).

Neither the policy favoring pluralism and experimentation nor the doctrine of dependence of municipalities on state power, however, can wholly shield state-dictated municipal arrangements from constitutionally oriented judicial oversight. The Equal Protection clause of the Fourteenth Amendment[3] "reaches the exercise of state power however manifested, whether exercised directly or through the subdivisions of the State." *Avery* v. *Midland County*, 390 U.S. 474, 480 (1967). Moreover, "[i]nstitutions of local government have always been a major aspect of our

[3] We need not decide at this point whether Puerto Rico is a state for the purposes of applying the Fourteenth Amendment, or a subdivision of the federal government, in which case the Fifth Amendment would apply. Plaintiffs cite both amendments, and the government has not argued this issue.

system, and their responsible and responsive operation is today of increasing importance to the quality of life for more and more of our citizens." *Id.* at 481. The delicate challenge for the courts is to discern and identify constitutional limits within which these new forms of municipal government may develop without trampling underfoot the constitutional rights of their citizenry.

In the present case, plaintiffs contend that the legislative scheme for constituting San Juan's Municipal Assembly results in an unconstitutional deprivation of equal protection in that residents of San Juan are denied "one-person, one-vote." If, by this, plaintiffs mean that the votes of residents of San Juan, taken as a whole, are "diluted" relative to the votes of residents of other Puerto Rican cities in their own municipal elections, we think their contention is unfounded. To argue that voting strength is "diluted," under equal protection analysis, implies that one group of citizens has more voting power than another group within the same constituent assembly. It is no violation of equal protection that citizens of Puerto Rico who live in cities outside San Juan may have more direct control over their municipal assemblies than residents of San Juan have over their own. A state has wide authority to classify cities differently, and institute different voting schemes within each. *Missouri* v. *Lewis,* 101 U.S. 22, 31 (1897); *see also Opinion of the Justices,* 277 Ala. 630, 173 So.2d 793 (1965).

Nor does the Equal Protection clause prohibit a state from permitting non-residents of a municipality to vote in the municipal elections. Allowing citizens who possess only a remote or indirect interest in the outcome of an election to vote in that election does not necessarily "dilute" the votes of those with a more direct interest. *Glisson* v. *Mayor and Councilmen of Savannah Beach,* 346 F.2d 135 (5th Cir. 1965).

To the extent, however, that, in claiming a denial of "one-person, one-vote," plaintiffs contend that San Juan's scheme for constituting its Municipal Assembly dilutes the voting power of some San Juan residents relative to other San Juan residents, we agree. "[T]he concept of equal representation has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds* v. *Sims, supra,* 377 U.S. at 565. Here, residents of San Juan who vote in the statewide gubernatorial election for the winning candidate gain the indirect representation, within the Municipal Assembly, of the five assemblymen appointed by the Governor. In effect, residents of San Juan who, in voting for governor, find themselves in accord with a majority of their fellow electors—many of whom may reside outside the city—have significantly more voting power in their own Municipal Assembly than residents of San Juan who supported a losing gubernatorial candidate. The Governor's five appointees owe their allegiance, in large part, to those voters who supported the Governor in the last gubernatorial election, voters whose interests and views they are likely to represent. And because the appointees are members of the same legislative body, with the same functions and duties, as the elected members, a local minority of voters within San Juan that happens to be part of a state-wide majority may gain a majority of votes within the Municipal Assembly. Such a minority need elect only one assemblyman directly to defeat an issue requiring a two thirds vote; and it can run all of the affairs of San Juan if it succeeds in electing directly a mere third of the elected members. This additional representation for the minority, albeit indirect, results in systematic discrimination against those San Juan voters who did not support the winning gubernatorial candidate.

In a consistent line of decisions, beginning with *Wesberry* v. *Sanders,* 376 U.S. 1 (1964), dealing with con-

gressional apportionment, and *Reynolds* v. *Sims, supra,* dealing with state legislative apportionment, and extending through *Avery* v. *Midland County, supra,* and *Hadley* v. *Junior College District,* 397 U.S. 50 (1969), both dealing with local legislative bodies, the Supreme Court has held that "in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as practicable, as any other person's." *Hadley, supra,* 397 U.S. at 54. While the particular election schemes involved in these cases have varied, "in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions." *Id.* at 54. The initial decision to select a legislative body by popular election acts as a threshold; once that decision has been made, then the Equal Protection clause of the Fourteenth Amendment requires that each qualified voter be given the same opportunity to determine the membership of that legislative body as every other qualified voter.[4] In determining the membership of San

[4] In *Hadley, supra,* 397 U.S. at 58, the Court says that "where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not "represent that same number of people does not deny those people the equal protection of the laws," citing *Sailors, supra.* Although this could be read to mean that a state may appoint some members of an otherwise elected legislative body, without regard to the principle of "one-person, one-vote," we believe this to be an unlikely interpretation of the Court's opinion, for two reasons. First, other parts of the opinion clearly indicate that once an initial decision has been made to select legislators by popular election, voters must be given an equal opportunity to participate in that election. *Id.* at 56. Equal opportunity to participate would be a hollow guarantee if any number of additional legislators could be appointed without regard to equal representation. Secondly, the opinion of the Court in *Sailors* v. *Board of Education, supra,* to which the Court here refers, specifically leaves open the question of whether *legislators,* rather than non-legislative officials, may ever be appointed. Thus, in holding that a state may appoint certain officials without regard to "one-person, one-vote," *Sailors* refers only to non-legislative officers, and can in no way stand for the proposition that *legislators* may be appointed without regard to equal representation.

Juan's Municipal Assembly, however, some San Juan residents have more opportunity than others.

The Supreme Court has tended to use one of two standards for review when determining whether a particular state action which discriminates between groups of people violates the Equal Protection clause of the Fourteenth Amendment. The Court has employed a relaxed review of certain state action, normally in the areas of economic regulation and taxation, if it is sustained by a rational and legitimate state interest. But where state action substantially infringes upon fundamental interests, the Court has employed a stricter scrutiny, requiring a showing that the state action is reasonably necessary to promote a compelling state interest.

Not every limitation or incidental burden on the exercise of voting rights is subject to strict scrutiny, *Bullock* v. *Carter,* 405 U.S. 134, 143 (1972); *McDonald* v. *Board of Education,* 394 U.S. 802 (1969). In a series of recent decisions, the Supreme Court has given states some leeway in designing apportionment schemes which are reasonably related to valid state policies, such as respecting the boundaries of political subdivisions. *See Mahan* v. *Howell,* 410 U.S. 315 (1973); *White* v. *Regester,* 412 U.S. 755 (1973); *Gaffney* v. *Cummings,* 412 U.S. 735 (1973). In none of these more recent cases, however, has the Court found the infringement upon voting rights to be a "substantial" one.

When the infringement upon voting rights becomes substantial, the higher standard of scrutiny is invoked, "[e]specially because the right to exercise the franchise in a free and unimpaired manner is preservative of other basic

civil and political rights. . . ." *Reynolds* v. *Sims, supra,* 377 U.S. at 562. A substantial infringement upon voting rights occurs when other basic civil and political rights, such as the First Amendment right of association, are impaired. *See Kusper* v. *Pontikes,* 42 U.S.L.W. 4003, 4005 (Nov. 19, 1973); *Mancuso* v. *Taft,* 476 F.2d 187 (1973); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972); *Williams* v. *Rhodes,* 393 U.S. 23 (1968).

An infringement of voting rights at the local level is particularly likely to impair the right of association, for it is within communities and neighborhoods that political association can be most effective. Local political organization has long functioned as the backbone of American politics, and local government has been the traditional training ground for political organizing. Generations of Americans, including immigrant and urban poor, have learned the importance of local political organization through its impact upon local government. The impetus to exercise the right of association is dependent upon its political effectiveness, and the effectiveness of the right of association is intimately linked, at the local level, to the power of the vote. *Williams* v. *Rhodes, supra,* 393 U.S. at 41, 42; *Mancuso* v. *Taft, supra,* 476 F.2d at 196. "[T]he effect of self-government where equal political rights have their fair value is to enhance the self-esteem and the sense of political competence of the average citizen. His awareness of his own worth, developed in the smaller associations of his community, is confirmed in the constitution of the whole society." J. Rawls, *A Theory of Justice* 234 (1972). If the power of the local vote is infringed by a voting scheme which allows a local minority to gain a majority within the municipal assembly, as in the present case, local political association is made ineffective, and the right of association is thereby discouraged.[5] In *Mancuso* v. *Taft, supra,* 476 F.2d at 196, the court used strict review to invalidate a Cranston, Rhode Island charter provision that prohibited city employees from continuing to serve the city after becoming candidates for public office. The court found that the First Amendment protected the freedom to associate, and that that freedom was infringed when the city effectively barred its employees from seeking office, thereby narrowing the options available for political organization. The scheme before us for constituting San Juan's Municipal Assembly affects association rights even more dramatically: if the majority of San Juan voters lack sufficient power to gain a

[5] Our explication of the important relationship existing between the First Amendment right of association and the right to vote in local governmental elections should not be taken to mean that the First Amendment is infringed whenever and wherever local governments are appointed, rather than elected, or when no local government exists. We hold, simply, that when provision is made for local government elections in which the voting power of some local electors is diluted relative to the voting power of others, it is likely that the associational rights of the former are substantially burdened, because their ability to engage in effective political organizing is impaired. In *Sailors* v. *Board of Education,* 387 U.S. 105, 110 (1966), the Supreme Court specifically reserved judgment on whether local legislators may be appointed, rather than elected. *But see* dissenting opinion of Mr. Justice Fortas in *Fortson* v. *Morris,* 385 U.S. 231, 242 (1966), indicating that the Constitutional guarantee of a republican form of government, embodied in Article IV, § 4, would require popular election. *See also* the opinions of several state courts, holding that citizens have an inherent right, grounded in the Common Law, to local "home rule." *Kansas City* v. *School District of Kansas City,* 356 Mo. 364, 201 S.W.2d 930 (1947); *Dowell* v. *Board of Education of Oklahoma City,* 185 Ok. 342, 91 P.2d 771 (1939); *State* v. *Bass,* 171 N.C. 780, 87 S.E. 972 (1916); *Hawkins* v. *Grand Rapids,* 192 Mich. 276, 158 N.W. 953 (1916); *State* v. *Burr,* 65 Wash. 524, 118 P. 639 (1911); *Att. Gen.* v. *Detroit,* 58 Mich. 213, 24 N.W. 887 (1885).

We fully recognize, in addition, that many incidental burdens on voting rights may have an indirect impact upon the freedom to associate. But when the burdens on voting rights are local in character and enable a local minority to gain a majority within the municipal assembly, the right to associate will be directly discouraged and the burden upon voting rights will be substantial.

majority of seats in the Municipal Assembly, their options for political organization are severely narrowed. This case is in no fundamentally distinguishable posture from that which would be presented if the proportions were reversed by a New York law which allowed the citizens of New York City to elect five of seventeen council members, the governor to appoint twelve. We cannot conceive that a court would fail to find that, under such an arrangement, the freedom of association of New York City's millions had been substantially infringed. We conclude that L.P.R.A., tit. 21, § 1152(b), infringing upon fundamental First Amendment rights, must receive strict equal protection scrutiny.

In order for the scheme to withstand strict scrutiny, the appellees must show that appointment by the governor of five members of San Juan's Municipal Assembly is a reasonably necessary measure to achieve a compelling state interest. *Kramer* v. *Union Free School District,* 395 U.S. 621, 627 (1969). Appellees contend that San Juan's unique relationship with the rest of the island of Puerto Rico, based in part upon its historical role as capital city and in part upon its present dominance as the center of the island's cultural and commercial life, requires that citizens of Puerto Rico who live outside San Juan be given some influence over how municipal affairs, certain to affect them, are conducted. *See* Diario de Sesiones, Senate of Puerto Rico, vol xiii, tomo 4, at 1715. Undoubtedly, states have an important interest in providing all their citizens with the means of exerting some influence over governmental decisions, even at a local level, that affect their lives. The fate of San Juan's port, its university, its main traffic arteries, its banks and its industry is certain to have an important effect upon citizens of Puerto Rico living outside the city limits. Their stake in San Juan, and Puerto Rico's interest in protecting that stake, is a compelling one.

Yet we do not consider the means chosen to achieve this end as reasonably necessary. In pursuing such compelling interests, states cannot choose means which unnecessarily burden or restrict constitutionally protected activity. *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972). Statutes affecting constitutional rights must be drawn with precision, *NAACP* v. *Button,* 371 U.S. 419, 438 (1963); *Unied States* v. *Robel,* 389 U.S. 258, 265 (1967), and they must be "tailored" to serve their legitimate objectives. *Shapiro* v. *Thompson,* 394 U.S. 618, 631 (1969). Most importantly, if there are other, reasonable ways to achieve these goals while imposing a lesser burden upon constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose "less drastic means." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *see* Note, *Less Drastic Means and the First Amendment,* 78 Yale L. J. (1969).

Here, the important stake had by non-residents of San Juan in certain aspects of the city's administration is sought to be protected by five representatives in the Municipal Assembly, appointed by the governor of Puerto Rico. The scheme is improperly "tailored" for its legitimate objective.

The interest of non-residents of San Juan in those aspects of San Juan government most likely to affect them is at best remotely protected by the statutory scheme. There is no requirement that these five representatives reside outside the city of San Juan, or that they share any of the interests of non-residents. Indeed, we were told at argument that they are in fact residents of San Juan. Instead, they owe their allegiance to the governor, and, indirectly, to all those who elected the governor, many of whom may reside within the city of San Juan. Nor is there any requirement that they possess any special expertise concerning any of the matters which may be of especial concern to non-residents; that they have

any systematic guidance or staff help from the legislature or governor; or that they account in any way for their actions. Furthermore, even if the interest of non-residents were more fully protected, the scheme would be excessive and overinclusive, since the five appointees exert just as much influence over parochial matters, such as the condition of local streets, as they do over matters that have a broad impact upon outlying districts.

Several alternatives are available which are likely to achieve the statutory goal with less burden upon constitutionally protected rights, such as the creation of special-purpose authorities, each having responsibility over an aspect of San Juan government that had a direct impact upon non-residents of San Juan. The Supreme Court has recently exempted such special-purpose units of government from the "one-man, one-vote" rule, suggesting that discrete public services, not financed by a single municipality, and affecting only certain groups of citizens, may be administered without regard to the mandates of *Reynolds, supra, Hadley, supra,* and *Avery, supra. Salyer Land Co.* v. *Tulare Lake Basin,* 410 U.S. 719 (1973). Another example would be a Commonwealth review and veto over certain of San Juan's legislation that would be likely to have an important impact upon the rest of the country.

We conclude, therefore, that the statutory scheme employed by the Commonwealth of Puerto Rico for constituting the Municipal Assembly of San Juan constitutes an unconstitutional deprivation of equal protection, and substantially impairs the voting rights of certain residents of San Juan. In order to give the legislature of Puerto Rico an opportunity to bring its statutory scheme for constituting San Juan's Municipal Assembly into accord with the Equal Protection clause of the Fourteenth Amendment, we will retain jurisdiction while deferring a hearing on the issuance of a final injunction for one year. Our decision to withhold immediate relief in this case is grounded

on our desire to avoid a sharp disruption both of the electoral process and the governance of San Juan. As stated by Mr. Justice Douglas, in concurring in *Baker* v. *Carr,* 369 U.S. 186 (1962), "any relief accorded can be fashioned in the light of well-known principles of equity."

It is so ordered.

/s/ Frank M. Coffin
FRANK M. COFFIN, *Chief Judge,*
U .S. Court of Appeals for the First Circuit

/s/ Hernan G. Pesquera
HERNAN G. PESQUERA, *U. S. District Judge,*
District of Puerto Rico

Judge Cancio dissents for the reasons stated in his Opinion and Ruling from the Bench on January 8, 1973, specifically beginning at line 18 of page 11 of the transcript of the proceedings of that day.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1115

GERMAN ORTIZ, ET AL., *Plaintiffs, Appellees,*

v.

HON. RAFAEL HERNANDEZ COLON
GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO, ET AL.,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(385 F. Supp. 111)

Before

ALDRICH, McENTEE and CAMPBELL,

Circuit Judges.

Miriam Naveira de Rodon, Solicitor General, with whom Peter Ortiz, Deputy Solicitor General, was on brief, for appellant.

Harvey B. Nachman, with whom Dubon & Dubon and Nachman, Feldstein & Gelpi were on brief, for appellees.

February 28, 1975

ALDRICH, *Senior Circuit Judge.* We are faced with a somewhat thorny problem. On January 16, 1974 a three-judge district court, finding that it had jurisdiction, and declining to abstain because it saw no way that the Puerto

Rico Supreme Court could resolve or remove the difficulty,[1] held unconstitutional 21 LPRA § 1152(b) under which the Governor of Puerto Rico shall add to the twelve elected members of the Municipal Assembly of San Juan five members appointed by himself with the advice and consent of the Senate. 385 F. Supp. 111. Hopeful that the Puerto Rico legislature might see fit to amend the statute so as to remove what the court saw as an unconstitutional defect, the court issued no injunction, but contented itself for the nonce with entering a declaratory judgment. We say for the nonce, because it expressly retained jurisdiction and the right to issue an injunction later if the legislature did not see fit to respond.

The legislature did not respond. In the meantime the defendants appealed. Taking note of the filing of the appeal, this court requested the parties to state their position as to whether the appeal lay with us or with the Supreme Court. Upon receipt of memoranda we concluded last April, a conclusion to which we adhere, that an appeal did not, on the then state of the record, lie in the Supreme Court. *Compare Gunn* v. *University Committee to End the War in Vietnam,* 1970, 399 U.S. 383, with *Schmidt* v. *Lessard,* 1974, 414 U.S. 473 (per curiam). At the same time we stated that we were expressing no view on whether there was a final judgment, so as to permit an appeal to us. The parties did not, in response to this motion, move to have the case transferred to the Boston calendar for early disposition of that question, or to submit on briefs without argument. We face that question now.

Before dealing with this issue defendants raise a new question of jurisdiction. We feel that our supervisory

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[1] The Puerto Rico Court could not, by any process of construction, alter the fact that the Governor of Puerto Rico can appoint five persons of his choice to the San Juan Assembly; nor could it by interpretation avoid the consequence that by this action he may change a minority party in the Assembly into a majority.

power, 28 U.S.C. § 1651, at least calls for comment, nothing that our comment will not be final since the matter of jurisdiction always remains open. Defendants now contend that the district court itself had no jurisdiction. The argument goes like this. In *Calero Toledo* v. *Pearson Yacht Leasing Co.*, 1974, 416 U.S. 663, the Court held that Puerto Rico fits the term "state" for the purpose of three-judge district court jurisdiction under 28 U.S.C. § 2281, which was enacted for "the purpose of insulating a sovereign State's laws from interference by a single judge . . ." Id. at 671. See *Stainback* v. *Mo Hock Ke Lok Po*, 1949, 336 U.S. 368, 377-78. Since the Commonwealth of Puerto Rico had become a self-governing constitutional entity independent of specific Congressional direction and thus " 'sovereign over matters not ruled by the Constitution,' " see *Mora* v. *Mejias*, 1 Cir., 1953, 206 F.2d 377, 387-88, *Calero Toledo* held it no less entitled than the states to protection of three-judge scrutiny under section 2281. 416 U.S. at 670-73. Cf. *Wackenhut Corp.* v. *Rodriquez Aponte*, D.P.R., 1966, 266 F.Supp. 401, 405, aff'd per curiam, 386 U.S. 268. Because jurisdictional requirements in *Calero Toledo* were clearly satisfied under 28 U.S.C. § 1331, the Court refrained from considering whether the Commonwealth might also be characterized as a state for the purposes of jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3), see 416 U.S. at 677 n. 11, although noting that the propriety of such a characterization depends upon the extent to which it comports with the overall intent and "serves . . . the purposes" of the legislation. Id. at 675. See also *District of Columbia* v. *Carter*, 1973, 409 418, 420.

However, the Court addressed the intent and purposes of section 1983 in *District of Columbia* v. *Carter*, ante, and held that the District of Columbia might not properly be termed a "State or Territory" thereunder. See also *Washington Free Community, Inc.* v. *Wilson*, D.C. Cir., 1973, 484 F.2d 1078, 1081. Defendants argue that these

cases are controlling of the instant question. We agree, but with the opposite conclusion. The Court determined in *Carter* that section 1983 was enacted to protect citizens against unconstitutional state action under the Fourteenth Amendment by conferring federal jurisdiction over sovereign entities not otherwise subject to federal control. 409 U.S. at 423-30. Since the District of Columbia is neither a state for the purposes of the Fourteenth Amendment, see *Bolling* v. *Sharpe*, 1954, 347 U.S. 497, 499, nor in any sense insulated from plenary Congressional authority over "all the legislative powers which a state may exercise over its affairs," *Berman* v. *Parker*, 1954, 348 U.S. 26, 31, the statutory purposes of section 1983 would not be served by the District's inclusion within the provision's jurisdictional ambit. 409 U.S. at 424, 429.

The Commonwealth's situation is precisely the opposite. Indeed, the very reasons which called in *Calero Toledo* for the Commonwealth's special protection by a three-judge district court as a matter of comity and respect—its sovereign status and functional independence from Congressional control—call with equal force for the special protection of the Commonwealth's citizens against unwarranted and otherwise insufficiently checked governmental action provided by 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).

The citizens of the several states are permitted to seek redress in the federal courts for deprivation of their rights under color of state law without first seeking relief in the state courts. *Monroe* v. *Pape*, 1961, 365 U.S. 167, 183. We yield to no one in our regard for the Supreme Court of Puerto Rico, but at the same time, if citizens of the several states may call for an initial decision in the district court without deferring to the courts of their local state, we must wonder how we could conscientiously hold that under 28 U.S.C. § 1343 United States citizens resident in Puerto Rico are any less entitled. With great respect

to the distinguished Solicitor General of Puerto Rico who raised this point only at oral argument, we believe that it was a last minute concept not fully thought through in all its ramifications. We do not accept it.

Turning from the jurisdiction of the district court to our own, the appealability of this matter presents something of a dilemma. The district court's failure to take a position on whether to issue an injunction, since it was only a postponement of its decision, indicates, as we stated earlier, the lack of a right to appeal to the Supreme Court. On the other hand, this same lack of finality raises serious questions of our own jurisdiction. See 28 U.S.C. § 1291. None of the recognized exceptions apply, unless one were to say that the decision was essentially final because only a routine and procedural matter remained. Cf. *Mills* v. *Alabama,* 1966, 384 U.S. 214, 217. However, such an analysis would immediately raise the spectre that in substance we would be acting beyond our powers. If we were to take jurisdiction, render a decision on the merits, and send the case back, either to enter an injunction, or to dismiss, and hence deny one, we would seem in so doing to have directly usurped the Supreme Court jurisdiction.

In a 2-1 decision of the Second Circuit, in a stronger case for a taking jurisdiction than this one because the district court had been less plain in reserving consideration of a possible injunction, *Thoms* v. *Heffernan,* 2 Cir., 1973, 473 F.2d 478, *vacated on other gr'ds,* 7/8/74, U.S. the court took jurisdiction and affirmed the district court. But at the same time, it expressly recognized that if, thereafter, the district court issued an injunction, the court of appeals ruling would be automatically mooted. See 473 F.2d at 480 n. 1. With due respect, this seems a most unsatisfactory solution. Our affirmance would give the state totally free rein to disregard our ruling, and hence require the district court to issue the injunction, thereby mooting

our decision, according to *Thoms,* and then appeal to the Supreme Court. Nor could we criticize a state for so exercising the rights which Congress has given it. Rather, we think the majority in *Thoms* has again merely illustrated the wisdom of the old adage that hard cases—here a peculiar statute—make bad law. We prefer Judge Timbers' dissent, and the view of another panel of the Second Circuit which he quoted.

In accordance with that view, see 473 F.2d at 487-88, we decline jurisdiction and take no position on the merits, but remand the case to the district court to take such action as it sees fit on the injunction.[2]

Because Chief Judge Coffin is a member of that court and, because he has already made a decision therein, he must be disqualified from making a designation to fill the vacancy created by the resignation of former Judge Cancio. The remaining members of the Circuit Council appoint the Honorable Juan R. Torruella, U.S. District Judge for Puerto Rico, to be the third member of the three-judge court.

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[2] We take informal note of the defendants' urging us not to reject jurisdiction because rejection will result in considerable lost motion. We regret the lost motion, but it is axiomatic that jurisdiction cannot be conferred by consent. So long as there remains a possibility that an injunction may be needed, our declination must stand.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 8-78

GERMAN ORTIZ, ET AL., *Plaintiffs*

vs.

HON. RAFAEL HERNANDEZ COLON,
GOVERNOR OF THE COMMONWEALTH OF PUERTO RICO,
ET AL., *Defendants*

Order

Following remand of this action by the United States Court of Appeals for the First Circuit for lack of jurisdiction (decision of February 28, 1975) ——F.2d ——, plaintiffs moved for entry of a permanent injunction. Defendants countered with a motion to dismiss and for rehearing, based on a lack of jurisdiction in this Court and reasserted their contention that this Court should abstain and defer to the courts of the Commonwealth of Puerto Rico. The motions were consolidated for hearing, and all parties having appeared by counsel, and after due deliberation upon their respective contentions, this matter is ripe for final disposition.

The issues of abstention and jurisdiction have been previously raised and decided in this case. In the first decision herein, then Chief Judge Cancio ruled that abstention would be improper, although he dismissed the complaint on other grounds. In reversing and ordering reference to a three judge court, the Court of Appeals in effect found jurisdiction in the District Court, and tacitly rejected the application of abstention. *Ortiz* v. *Colon,* 475 F.2d 135 (1973). This Court then entered its Judgment and Order of January 16, 1974, again affirming jurisdiction and refusing to abstain. 385 F. Supp. 111. Defendants appealed and were afforded another opportunity to argue both issues before the Court of Appeals, and while "the matter of jurisdiction always remains open", F.2d at p. , we find the comments of the Court of Appeals more persuasive on that issue than defendants' arguments before us after remand, and nothing has been presented to change the view of all judges who have heard this matter that abstention herein would be improper.

Defendants' motion to dismiss and for rehearing is denied.

Plaintiffs' request entry of a permanent injunction, prohibiting the appointed assemblymen from taking their seats at the next meeting of the Municipal Assembly scheduled for April 7, 1975, and changing the quorum requirement to three-fourths of the twelve elected members of the Assembly. The present quorum consists of a majority of the Assembly, LPRA, Tit. 21, Sec. 1157(a), and the proposed quorum would thus continue to require nine members. In our Judgment and Order of January 16, 1974, we held the statutory scheme employed by the Commonwealth of Puerto Rico for constituting the Municipal Assembly of San Juan unconstitutional, and deferred action on the issuance of a final injunction for one year to afford the Commonwealth time for corrective action. No such action has been taken, and it appears none is contemplated. We are left with no alternative but to terminate the unconstitutional statutory scheme by injunction, although not necessarily in the same terms as prayed by plaintiffs.

Plaintiffs' motion for entry of a final injunction is granted. Effective relief requires that any incumbent member of the Assembly appointed by the Governor of the Commonwealth of Puerto Rico be restrained and enjoined from continuing to hold his seat or participating in any way in the deliberations or activities of the Assembly, and that the Governor be restrained and enjoined from appointing new members thereof to replace the enjoined

members or to replace members who have or may resign or as additional members.

An appropriate form of judgment and permanent injunction will be entered.

So ordered.

/s/ FRANK M. COFFIN
Frank M. Coffin
U.S. Circuit Judge

/s/ HERMAN G. PESQUERA
Herman G. Pesquera
U.S. District Judge

/s/ J. R. NARELLES
J. R. Narelles
U.S. District Judge

APPENDIX F

Judgment of Permanent Injunction

(Caption Omitted in Printing)

It having been heretofore determined that the statute of the Commonwealth of Puerto Rico, LPRA, Tit. 21, Sec. 1152(b), which authorizes the Governor of Puerto Rico to appoint five members of the San Juan Municipal Assembly is unconstitutional for the reasons set forth in the Opinion of this Court entered on January 16, 1974, 385 F. Supp. 111; and the Commonwealth of Puerto Rico having failed to take any corrective action in the term of more than one year during which entry of this injunction was deferred; and it appearing that no such corrective action is contemplated; and it further appearing that plaintiffs are suffering, and will continue to suffer, immediate and irreparable loss of or damage to their constitutional rights from the failure of such corrective action; it is hereby

ORDERED, ADJUDGED and DECREED that each incumbent member of the Municipal Assembly of the Municipality of San Juan, in the Commonwealth of Puerto Rico, who has assumed that office by virtue of an appointment by the Governor of Puerto Rico, be, and hereby is, permanently enjoined and restrained from occupying or continuing to occupy said office, and from attending or participating in the deliberations or activities of said Assembly unless expressly invited to do so by said Assembly; and it is further

ORDERED, ADJUDGED and DECREED that the Governor of the Commonwealth be, and hereby is, permanently enjoined and restrained from appointing any members of the Municipal Assembly of the Municipality of San Juan, in the Commonwealth of Puerto Rico, to replace the members hereby enjoined, or to replace any members who have or in the future may resign or as additional members; and it is further

ORDERED, ADJUDGED and DECREED that wherever in said statutory scheme a proportion of the members of said Municipal Assembly is required for action, LPRA, Tit. 21, Sections 1157(a) and 1165, said proportion shall be determined with reference to the twelve elective seats in said Assembly, without requirement of any fixed minimum number other than that resulting from the application of said proportion; and it is further

ORDERED, ADJUDGED and DECREED that this judgment of permanent injunction shall become effective immediately upon its entry; and it is further

ORDERED, ADJUDGED and DECREED that the defendants pay the costs of these proceedings to be taxed by the Clerk of this Court, and that execution issue for the same.

/s/ FRANK M. COFFIN
Frank M. Coffin
U.S. Circuit Judge

/s/ HERMAN G. PESQUERA
Herman G. Pesquera
U.S. District Judge

/s/ J. R. NARELLES
J. R. Narelles
U.S. District Judge

APPENDIX G

Notice of Appeal

(Caption Omitted in Printing)

To THE HONORABLE COURT:

Notice is hereby given that the Defendants, Hon. Rafael Hernández-Colón, Governor of the Commonwealth of Puerto Rico, Luis Muñoz Rivera, Tomás Torres Marrero, Sixto Pacheco, and Dafne Rojo, hereby appeal to the Supreme Court of the United States, from the JUDGMENT OF PERMANENT INJUNCTION filed and entered on this action on April 3, 1975.

This appeal is taken pursuant to 28 United States Code, Section 1253.

San Juan, Puerto Rico, April 4, 1975

/s/ MIRIAM NAVEIRA DE RODON
Miriam Naveira de Rodon
Solicitor General

/s/ PETER ORTIZ
Peter Ortiz
Deputy Solicitor General

(Proof of Service Omitted in Printing)

APPENDIX H

Motion to Dismiss and for Rehearing

(Caption Omitted in Prining)

To The Honorable Court:

Comes now Defendants, Hon. Rafael Hernández Colón, Governor of the Commonwealth of Puerto Rico, and respectfully alleges, moves and prays:

1. On January 16, 1974 this Hon. Court held unconstitutional 21 LPRA 1152(b) under which the Governor of Puerto Rico appointed five members of the Municipal Assembly of San Juan. (Reported at 385 F. Supp. 111 (1974)).

2. On February 28, 1975 the Court of Appeals for the First Circuit remanded the case to this Hon. Court because it held that no final judgment had been entered which could be appealed to the Supreme Court of the United States or to that Court. (Case No. 74-1115)

3. The Court of Appeals appointed Hon. Juan R. Torruella, U.S. District Judge for Puerto Rico, as the third member of this Court.

4. Since it has been determined that no final judgment has been entered, this Court can now dismiss the complaint or set aside its prior opinion and order on the following grounds:

A. This Hon. Court lacks jurisdiction over the action and complaint since the Commonwealth of Puerto Rico is not a state or territory under 28 USC 1343 and 42 USC 1983.

B. This Hon. Court should set aside its prior opinion and order and abstain from considering and passing upon the merits of plaintiffs' allegations.

Wherefore, Defendants prays that the action and com-

plaint be dismissed, that the opinion and judgment entered on January 16, 1974 be set aside and that any other pertinent remedy or action in our favor be entered.

Respectfully submitted.

San Juan, Puerto Rico, March 12, 1975

Miriam Naveira de Rodon
Solicitor General
Peter Ortiz
Deputy Solicitor General

APPENDIX I

(S.B. 1044) No. 12

(Approved August 8, 1974)

AN ACT

To amend Section 678 of the Code of Civil procedure of 1933 which establishes the prohibition for the use of the writ of injunction or restraining order.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.—Section 678 of the Code of Civil Procedure of 1933 is hereby amended to read as follows:

"Section 678.—An injunction or restraining order cannot be granted.

1) To stay a judicial proceeding which is being prosecuted at the time the action soliciting the injunction is filed, unless the restraint is necessary to prevent a multiplicity of such proceedings or to avert depriving the petitioner of any right, privilege or immunity protected by the Constitution or the laws of the Commonwealth of Puerto Rico or by the Constitution or the laws of the United States of America applicable to persons under the jurisdiction of the Commonwealth of Puerto Rico; Provided, that upon issuing such order the Court shall consider the public interest involved, conclude that the petitioner has a real possibility of prevailing on the merits of his petition, and determine that the order is indispensable to prevent an irreparable damage to the petitioner. Said order shall have force only in the specific case before the court and between the parties.

2) .....

3) To restrain the application or enforcement of any statute of the Legislature of Puerto Rico, or the performance by a public officer, a public corporation, or a public agency, or by any employee or officer of such corporation or agency of any act authorized by law of the Legislature of Puerto Rico, unless it has been determined by final, firm, unappealable, and unreviewable judgment that such statute or act authorized by law is unconstitutional or invalid.

Any injunction, preliminary, permanent, or of the nature of a restraining order, including any order to enforce the jurisdiction of a court or to secure the enforcement of any judgment, issued under the circumstances set forth in this clause 3 and in force on the date this act takes effect, or which may hereafter be issued, shall be null and ineffective.

Provided, however, that the court may issue said temporary restraining order, preliminary or permanent injunction subject to the terms of Rule 57 of Civil Procedure.

1) In those cases where it is indispensable to make effective its jurisdiction and upon previous finding that the order is indispensable to prevent an irreparable damage to the petitioner;

2) When in the petition it is pleaded that any person, under the authority of any law, ordinance or regulation of the Commonwealth of Puerto Rico, is depriving or is causing someone else to deprive the petitioner of any right, privilege, or immunity protected by the Constitution or the laws of the Commonwealth of Puerto Rico or by the Constitution or the laws of the United States of America applicable to persons under the jurisdiction of the Commonwealth of Puerto Rico.

Provided further, that upon issuing said order, the Court shall consider the public interest involved and conclude that the petitioner has a real possibility of prevailing on the

merits of the petition. Said order shall have force only in the specific case before the court and between the parties.

3) .....

4) .....

5) .....

6) .....

7) .....

Section 2.—This act shall take effect immediately after its approval.

APPENDIX J

(S.B. 1045) No. 13

(Approved August 8, 1974)

AN ACT

To amend subsection (c) of Rule 53.1 and Rule 53.4 of the Rules of Civil Procedure for the General Court of Justice, adopted by the Supreme Court of Puerto Rico on November 15, 1957, and transmitted to the Legislature on January 13, 1958, as amended.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.—Subsection (c) of Rule 53.1 and Rule 53.4 of the Rules of Civil Procedure for the General Court of Justice, adopted by the Supreme Court of Puerto Rico on November 15, 1957, and transmitted to the Legislature on January 13, 1958, as amended, are hereby amended to read as follows:

"Rule 53.—Procedure on Appeal, Petition for Review and Petition for Certification.

53.1 When and How taken (a) .....

(c) A petition for certification is perfected by filing an application with the Secretary of the Supreme Court at any time after service of notice to the parties of the docketing of the record on appeal or review in the Superior Court. The Secretary of the Supreme Court shall transmit copy of such application to the clerk of the Part of the Superior Court where the case is pending.

A petition for certification is also perfected when the Supreme Court of the United States, any United States Circuit Court of Appeals, Federal District Court or State Court of the different states of the Union has before its

consideration a case in which local issues of law arise that are determinant in the cause of action taken before any of said courts, on which there are no clear precedents in the decisions of the Supreme Court of the Commonwealth of Puerto Rico, and applies for a finding on such issues by filing the proper application with the Secretary of the Supreme Court.

* * * * * * * * * *

53.4 Petition for Certification

The petition for certification shall specify the names of the petitioners, shall designate the case pending in the Superior Court named in the petition; and shall state briefly the importance of the case to the public which warrants departure from the ordinary procedure and a direct adjudication by the Supreme Court. Upon filing the petition, the petitioner shall serve notice thereof on all the adverse parties in the manner provided in Rule 67.

When the petition for certification originates in a Federal Court or in a State Court of one of the States of the Union, there shall be followed the procedure that the Supreme Court of Puerto Rico shall establish through regulation to such effect, which shall take effect immediately after its approval by said Court.

Section 2.—This act shall take effect immediately after its approval.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1522

RAFAEL HERNANDEZ COLON, etc.,
APPELLANTS,

v.

GERMAN ORTIZ, et al.,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

APPELLEES' MOTION TO AFFIRM AND BRIEF IN SUPPORT OF MOTION TO AFFIRM

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In the

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

MOTION TO AFFIRM

COME now the Appellees by their undersigned counsel and respectfully move this Honorable Court to affirm the decision of the three-judge court of the United States District Court of Puerto Rico, on the ground that the issues raised are so insubstantial that a plenary hearing is not warranted. *Bailey* v. *Patterson*, 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962).

The Appellants challenge to the decision on the merits would in effect require a reversal of a complete line of cases, which represent one of the great achievements of this Court in making American democracy so viable. Solid

support of the lower court's holding is found in *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Avery* v. *Midland County,* 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1967); *Sailors* v. *Board of Education,* 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1966); *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Hadley* v. *Junior College District,* 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1969).

The jurisdictional issues raised by Appellants are equally insubstantial. The doctrine of abstention was examined by three different District Judges and four judges of the United States Court of Appeals for the First Circuit and was found to be inapplicable.

The jurisdiction of the district court under 28 U.S.C. § 2281 was held proper last term in *Calero Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 94 S. Ct. 767, 42 L. Ed. 2d 452 (1974).

The argument that 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343(3) do not apply to the Commonwealth of Puerto Rico should not be entertained. Carried to its logical conclusion this argument would effectively deny all citizens and residents in the Commonwealth of Puerto Rico to the rights, privileges and immunities guaranteed by the United States Constitution.

WHEREFORE, for the foregoing reasons, more fully elaborated in the accompanying brief, it is respectfully prayed that the decision below be affirmed without further argument.

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APPELLEES' BRIEF IN SUPPORT OF MOTION TO AFFIRM

Jurisdictional Statement

Jurisdiction has been properly invoked under 28 U.S.C. § 1253. However, it is respectfully submitted that the issues presented are so insubstantial that the opinion below should be affirmed.

Question Presented

The only real question presented in this appeal is whether the holding on the merits by the three-judge court in *Ortiz* v. *Colon,* 385 F. Supp. 111 (D.P.R. 1974) is correct. Even though the question decided by the court below has

never been squarely presented in this Court, the motion for affirmance is proper. *Bailey* v. *Patterson,* 369 U.S. 31, 82 S. Ct. 549, 7 L. Ed. 2d 512 (1962). Geographical dilution of one's vote is not the only method to effectively disenfranchise certain voters in order to perpetuate power. Judge Coffin's opinion striking down 21 L.P.R.A. §§ 1152(b) is based upon the solid foundation of this Court's teachings in *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964); *Reynolds* v. *Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964); *Avery* v. *Midland County,* 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1967); *Sailors* v. *Board of Education,* 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1966); *Williams* v. *Rhodes,* 393 U.S. 23, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968) and *Hadley* v. *Junior College District,* 397 U.S. 50, 90 S. Ct 791, 25 L. Ed. 2d 45 (1969).

The appellants have raised and placed in the forefront certain alleged jurisdictional barriers. Abstention has been raised from the outset and has been rejected five times. The lack of jurisdiction of the District Court of Puerto Rico, or stated otherwise, the inapplicability of 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. §1343(3) is of recent vintage. In essence, the appellants are claimant that because of the unique status of the Commonwealth of Puerto Rico, neither the Fifth or Fourteenth Amendments of the United States Constitution apply in Puerto Rico, or, if they do, violations thereof by the Commonwealth may only be redressed in the Commonwealth Courts. This contention is refuted in the second portion of the brief.

Counterstatement of the Case

This is an action by citizens, residents and voters of the Municipality of San Juan, who brought the action on their own behalf and on behalf of all the residents of San Juan

for a declaratory judgment striking the special provisions for the creation of the San Juan Municipal Assembly as unconstitutional and for injunctive relief to prevent its enforcement.

The statutory scheme embodied in 21 L.P.R.A. § 1152(b) provides for 12 elected members to the Municipal Assembly, no more than 9 of whom may be members of the same political party, and 5 members to be appointed by the Governor of Puerto Rico. All assemblymen have the same powers. No other Municipality in Puerto Rico has appointed assemblymen, 21 L.P.R.A. § 1152(a).

The Municipal Assemblies of Puerto Rico have the power to levy and collect taxes, 21 L.P.R.A. §§ 641, et seq.; the power of eminent domain, acquisitions of property, public service undertakings, issuance of bonds and the ability to charge for services, 21 L.P.R.A. §§ 661, et seq. They have the power to own property, to obtain loans and grants from the federal government for the construction of public works and to issue special bonds for such construction, 21 L.P.R.A. §§ 811, et seq. Municipal governments also have the power to make temporary loans or issue temporary bonds or promissory notes subject to a statutory limit, 21 L.P.R.A. § 921.

Most of the appropriation ordinances require a two thirds vote of the governing body of the municipality. Pursuant to 21 L.P.R.A. § 1107 the municipalities are granted "full legislative and administrative powers in all matters of a municipal nature which redound to the benefit of the people and for their development and progress, and are authorized to develop general welfare programs and to create the necessary organizations for such purpose. Such powers include the operation of a school students transportation system, with or without charge,...". The second paragraph of this same section of law confers broad legislative and administrative power upon the

Municipal Assembly to govern the affairs of the Municipality.

The mayor of a municipality is the chief executive officer who must approve and sign the ordinances and resolutions of the Municipal Assembly or who may veto such resolutions. Two thirds of the total members of the assembly must join in their vote to overrule a Mayor's veto. The Municipal Assembly also has the power to create penal provisions for violation of municipal ordinances. The broad general duties and powers of the Municipal Assembly are iterated in 21 L.P.R.A. § 1173.

The statute which treats San Juan differently from all other municipalities in Puerto Rico dates from 1960. Despite the stated objectives of the law cited at pages 23-24 of Appellants' Brief, the only purpose the law serves is to concentrate political power in the hands of the Governor and prevents any effective grass roots leadership or political power base by the elected officials of San Juan, be they members of the same political power as the Governor, or members of an opposition party.

This action was commenced immediately after the inauguration of the Governor and prior to the taking of office by the San Juan Assemblymen. The "Statement" of the appellants apart from its editorial comments, correctly sets forth the history of the litigation.

Argument

Point I

21 L.P.R.A. § 1152(b) Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

For all of the reasons expressed in the opinion of the three-judge court, *Ortiz* v. *Colon*, 385 F. Supp. 111 (D.P.R. 1974), the judgment should be affirmed. Since new arguments have been raised by the defenders of the statute, a refutation of appellants' brief is necessary.

The appellees refuse to be drawn into a historical discussion of the "democratic" nature of the appointed "cabildos". Suffice it to say that the appointed "cabildo" does not satisfy the requirement of the guaranteed republican form of government.[1] Nor is there any quarrel with the proposition that municipal governments are "instrumentalities" of the states. Plaintiffs have always conceded that this concept pervades in American political life. The three-judge court below also recognized the needed flexibility and room for innovation in municipal government if the modern megalopolis were to be responsive to a larger, more complicated and varied constituency.

The lower court found that the additional representation for the minority resulting from the gubernatorial appointment made it possible for the minority to thwart any legislative policy of the Assemblyman who received the majority of the voters' support. This is a systematic dilution of the vote of all the residents of San Juan, said the court, who did not support the successful gubernatorial candidate. In this analysis, the court was correct. As the Supreme Court stated in *Reynolds* v. *Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) at page 565 of the official report:

> "Logically, in a society ostensibly grounded on representative government, it would seem reasonable

[1] The hoary tradition may be given due weight in many fields but can have no bearing on fundamental rights. The laws of distress and distraint, for example, is at least as old as the rise of feudalism. It had existed in Pennsylvania since Colonial times, yet it was held unconstitutional following the teachings of this Court. *Santiago* v. *McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970); *Gross* v. *Fox*, 349 F. Supp. 1164 (E.D. Pa. 1972); *Gibbs* v. *Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973).

that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result".

The word "State" con be read in the proper context as city. *Mancuso* v. *Taft,* 476 F.2d 187 (1st Cir. 1973).

But the Court could have gone farther and declared the statute void on its face. In Puerto Rico, with its polarization of parties on all issues, dependent upon the official party platform concerning status, it is obvious that a governor from one party could, and probably would, block a San Juan Mayor and Assembly elected by another party, on any issue that would enhance the public image of the state-wide minority. Yet, even when the Mayor and Assemblyman are from the same party, the Governor's appointees, who owe no allegiance to the voters or residents of San Juan, can block any measure of importance in the Municipal Assembly that requires a two thirds majority.

At the time this law was passed (July, 1960), one party was in control of Puerto Rico and San Juan and had been in control for nearly 16 years. It was then apparent that because of its size and growth, the political leader of San Juan had a base upon which to build support and have an independent opportunity to challenge the state wide political leadership within his or her own party. The appointments by the Governor became the means to exercise an effective check upon the aspirations of the elected leaders of San Juan of their constituents. This could destroy democratic processes at the grass root level as the lower court fully appreciated.

In 1968 the "opposition" party captured the Gubernatorial post, San Juan Mayoralty and Assembly and the House of Representatives. The Senate remained in the hands of the party that had been in control for a generation. While much legislation and many executive appointments were stymied because of the interparty strife in the Legislature, there was also intra-party strife between the city and state government as well. One piece of legislation upon which both parties agreed in the Legislature was House Bill 510. This Bill provided for the election of a Municipal Assemblyman from each of the eight electoral districts of San Juan, and six Assemblymen at Large. The minority parties would be guaranteed three Assemblymen. The present Governor, who at the time was President of the Senate, enthusiastically supporte this Bill. The then Governor vetoed the Bill. The veto cannot be justified on any governmental basis but only upon an internecine party-power basis. Certainly, the proposed measure would have enhanced the republican form of government to which all official documents pay homage. Contrarywise, the will of the people would have been even more directly represented had the measure not been vetoed, because each area of the city would have its own voice in the legislative body of the city. Conceding, as we must, that at large representation is not per se unconstitutional,[2] we also submit that representation by area with a similar social and economic point of view is more democratic and

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[2] *Dusch* v. *Davis*, 387 U.S. 112, 87 S. Ct. 1554, 18 L. Ed. 2d 656 (1967); *Whitcomb* v. *Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L. Ed. 2d 363 (1971); *Burns* v. *Richardson*, 384 U.S. 73, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 85 S. Ct. 498, 13 L. Ed. 2d 401 (1965); But compare *Wallace* v. *House*, 377 F. Supp. 1192 (W.D. La. 1974) and cases cited therein. While no claim is made that San Juan is geographically divided into racial groupings, the Court can take judicial notice that it is so divided economically, as are most cities.

a more faithful copy of the model republican form of government.

There is, therefore, no "rationale" for the present Section 1152(b). The alleged "rationale" is mere rationalization. The motive of the law is political control in the hands of the top party factotum to prevent the loss of power or prestige to the city government or its elected officials. *A fortiori*, if this motive is present when the same party is in control of both the Governor's mansion and the City Hall, it is more strongly felt when the occupants of these houses are of different parties. In the latter case it does more than destroy the form of republican government, it weighs votes differently depending upon which voters voted for the successful gubernatorial candidate.

Plaintiffs, appellees realize that this brings into focus an issue that the majority of the three-judge court did not meet, *i.e.*, May a state create a local legislative body, the representatives to which are selected in whole or in part by the appointive rather than the elective process? This question was reserved by the Supreme Court in *Sailors* v. *Board of Education of County of Kent*, 387 U.S. 105, 87 S. Ct. 1549, 18 L. Ed. 2d 650 (1967), but it is the essence of the problem. The Municipal Assembly of San Juan is a body with full legislative powers and the availability of the administrative-legislative distinction is not present here as it was in *Sailors*.

We respectfully urge that a legislative body must, under a republican form of government, be wholly elected. Appointed officials, other than for a vacancy during an unexpired term should not be contemplated in a free society.[3] A republican form of government is no idle guarantee, and such a government connotes direct election of all state

[3] *Patterson* v. *Burns*, 327 F. Supp. 745 (D. Hawaii 1971) (three-judge court); *Kaelin* v. *Warden*, 334 F. Supp. 602 (E.D. Pa. 1971) (three-judge court).

and local legislators.[4] While *Forston* v. *Morris*, 385 U.S. 231, 87 S. Ct. 446, 17 L. Ed. 2d 330 (1966) does hold that under certain circumstances a state legislator may elect or appoint a governor, the corollary that a governor may appoint a legislator for anything more than an unexpired term finds no support anywhere other than in non-democratic countries. All Americans must be reassured after weathering a national crisis unparalleled in our history, that the Constitution works, and that separation of powers will prevent the usurpation of power by the executive.

The compelling state interest test is the only test that may be applied in assessing state action where the sanctity of the vote is concerned. Any exclusion of citizens from the electoral process in general elections must be measured against that standard. *Kramer* v. *Union Free School District*, 395 U.S. 621, 89 S. Ct. 1886, 23 L. Ed. 2d 583 (1969); *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S. Ct. 1897, 23 L. Ed. 2d 647 (1969); *City of Phoenix* v. *Kolodziejski*, 399 U.S. 204, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972); *Stone* v. *Stovall*, 377 F. Supp. 1016 (N.D. Tex. 1974) (three-judge court).[5] Therefore, the holding of the majority of the lower court is correct, there remains the unexpressed conclusion that any legislative body cannot pass constitutional muster if its members are appointed in whole or in part for any purpose other than to assure

[4] It is acknowledged that states need not create municipalities, nor even grant the franchise to the administrative sub-divisions it may create. However, once that franchise is granted, the right to vote, or to have all citizens votes counted equally may not be conditioned. *Avery* v. *Midland County, Texas*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968); *Hadley* v. *Junior College District*, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970).

[5] Special purpose elections affecting only certain groups of citizens need not conform to this rigid test. *Salyer Land Co.* v. *Tulare Lake Basin*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973).

minority representation.[6] If it is correct to say, as the Supreme Court and lower court herein has said, "[it is] within communities and neighborhoods that political association can be most effective" (R. 52), then, it is at that level that the guarantee of a republican form of government must be most dearly defended.

Finally, it must be pointed out that San Juan plays no more a "unique" role in the life of Puerto Rico than does Boston in the life of Massachusetts or Honolulu in the life of Hawaii. The argument in 1960 by the Senate Majority Leader was specious because none of the activities he mentioned is controlled by the Municipality. The port of San Juan (and its international airport) is controlled by the Puerto Rico Ports Authority. 23 L.P.R.A. §331 *et seq.* The University of Puerto Rico is no longer concentrated in San Juan, but the largest campus remains within the city's boundaries. Even that campus is controlled by the Commonwealth government. 18 L.P.R.A. §601 *et seq.* The large traffic arteries are within the jurisdiction of the insular government. 9 L.P.R.A. §2001, *et seq.* Banking, 7 L.P.R.A. §1, *et seq.*; The Government Development Bank, 7 L.P.R.A. §551 *et seq.*; the Puerto Rico Industrial Development Company, 23 L.P.R.A. §271 *et seq.*, and industrial tax exemption, 13 L.P.R.A. §221, *et seq.* are all subject to state control. Nor do the appointed members of the Municipal Assembly represent areas other than San Juan. All appointed Assemblymen since the statute was enacted in 1960 have always been San Juan residents. Appellees respectfully submit that the so-called "justification" for the statute does not even satisfy the lesser standard of rational and legitimate state interest.

[6] There has never been a claim that guaranteed minority representation is unconstitutional. *Lo Frisco* v. *Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) (Three-judge court). Under the law in question this minority guarantee may be converted into minority rule. *Cerezo* v. *Buso*, ___ U.S. ___, 95 S. Ct. 767, 42 L. Ed. 2d 795 (1975), which was dismissed for want of a substantial question also involved Puerto Rico's guaranteed minority representation statute.

The holding below should be summarily affirmed.

Point II

Jurisdiction of the United States District Court Was Properly Invoked and Exercised.

A. *The Doctrine of Abstention Is Inapplicable.*

Appellant, as do all state, territorial or Commonwealth governments, raises the pseudo-jurisdictional ground of abstention. Abstention is a judicially created doctrine first enunciated in *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). It has become, in some instances, an additional self-imposed "barrier to the assertion by federal courts of the jurisdiction Congress has bestowed on them." Mr. Justice Douglas, dissenting in *Harris County Commissioner's Court* v. *Moore*, ___ U.S. ___, 95 S. Ct. 870, 878, 43 L. Ed. 2d 23 (1975). The Governor, appellant herein, has raised the issue three times before the District Court of Puerto Rico and twice before the United States Court of Appeals for the First Circuit.

Appellants now contend that in light of the opinion in *Harris County Commissioner's Court* v. *Moore*, ___ U.S. ___, 95 S. Ct. 870, 43 L. Ed. 2d 23 (1975), the three different district court judges and the four judges of the Court of Appeals erred in reading the prior decisions of this Court. The nub of the abstention doctrine as stated in *Harris County Commissioner's Court* is that "when a federal constitutional claim is premised upon an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to

settle the underlying state law question and thus avoid the possibility of unnecessarily deciding a constitutional question." 95 S. Ct. at 875. Abstention, however, may only be invoked in "special circumstances". *Zwickler* v. *Koota,* 389 U.S. 241, 248, 88 S. Ct. 391, 395, 19 L. Ed. 2d 444 (1967). The "special circumstance" that the District Court in *Zwickler* thought controlling was that the state statute could be construed by the state courts to avoid or modify the constitutional question. In reversing, this Court said, "But we have here no question of a construction of [the statute involved] that would 'avoid or modify the constitutional question' ". 389 U.S. at 249, 88 S. Ct. at 396.

Appellants admit that "the statute itself has only one interpretation". Appellants' Brief, p. 14. They must also admit that a state law claim was not raised in the complaint. Even were the Commonwealth Supreme Court to pass upon the question and construe the Municipal Law as a valid exercise of legislative power, it would not, in any way, affect the federal claim. *City of Chicago* v. *Atchison, Topeka & Santa Fe R. Co.,* 357 U.S. 77, 84, 78 S. Ct. 1963, 1067, 2 L. Ed. 2d 1174 (1958); *Public Utilities Comm'n* v. *United Fuel Gas Co.,* 317 U.S. 456, 462-463, 63 S. Ct. 369, 373-374, 87 L. Ed. 396 (1943).

There are four main policy considerations in the application of abstention:

1. The avoidance of a premature constitutional decision by a possible narrowing construction of the state law by a state court. *Lake Carriers Association* v. *MacMullan,* 406 U.S. 498, 92 S. Ct. 1749, 32 L. Ed. 2d 257 (1972).

2. The avoidance of needless conflict in the federal-state relationships. *Younger* v. *Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

3. The avoidance of the federal judiciary making tentative decisions on issues of state law. *Reetz* v. *Bozanich,* 397 U.S. 82, 90 S. Ct. 788, 25 L. Ed. 2d 68 (1970); or the

decision on the constitutionality of a state statute that is vague and has never been interpreted by the state tribunals. *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, 91 S. Ct. 156, 27 L. Ed. 2d 174 (1970).

4. The avoidance of unnecessary interference with state functions or regulatory schemes. *Lake Carriers' Association* v. *MacMullan, supra.*

None of the foregoing considerations is applicable. There can be no other meaning of the statute and no matter what a tribunal in Puerto Rico may say of the constitutionality of the statute, the federal claim would require federal adjudication. Whether the Supreme Court of Puerto Rico were to say, as the appellant says in its brief, that the Commonwealth Courts should be the first (if not the sole) arbiter of constitutionality, does not affect the federal rights of plaintiffs to equal protection of the law.[7]

If deference must be given to the unique status of Puerto Rico or its special relationship with the United States, that consideration does not embrace any different standard of testing the federally protected rights of citizens than

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[7] In *Gay* v. *Board of Registration Commissioners*, 466 F.2d 879 (6 Cir. 1972) after outlining policy considerations in the doctrine of abstention, the Court also listed the exceptions to the rule as distilled from Supreme Court opinions. Abstention is improper (1) if the underlying issue of state law is not the controlling issue, *McNeese* v. *Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1962); (2) if the federal right is not 'entangled in a skein' of state regulations, *McNeese* v. *Board of Education, supra*, (3) if it would require piecemeal litigation, *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1963); (4) if the issue of state law is certain and does not relate to questions which only a state court could authoritatively construe. *Wisconsin* v. *Constantineau*, 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1970); *Fornaris* v. *Ridge Tool Co., supra.* There are, indeed, still other exceptions, viz., to prevent immediate loss of constitutional rights. *Dombrowski* v. *Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

does the relationship between the United States and any State.

The tortuous path of this litigation, including the refusal by the Commonwealth to enact legislation that would have avoided the injunction, indicates a clear desire for delay. For political rather than governmental reasons, there has been an attempt to prevent a final adjudication in time for proper procedures in the 1976 elections. This long delay, by itself, is sufficient reason to reject the doctrine of abstention in this case. *Hostetter* v. *Idelwild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329, 84 S. Ct. 1293, 1296, 12 L. Ed. 2d 350 (1964).

B. *Puerto Rico Is a "State" Within the Meaning of 28 U.S.C. §1343(3) and 42 U.S.C. §1983.*

In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), *rehearing denied* 417 U.S. 977, 94 S. Ct. 3187, 41 L. Ed. 2d 1148, (1974), it was stated:

> "... we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as "State statute[s]" for purposes of the Three-Judge Court Act, serves, and does not expand the purposes of [28 U.S.C.] §2281. We therefore hold that a three judge court was properly convened under that statute, and that direct appeal to this Court was proper under 28 U.S.C. §1253 . . ."

At the end of the omitted footnote, the Court added,

> "We have no occasion to address the question whether Puerto Rico is a 'State' for purposes of 28 U.S.C. §1343, a jurisdictional basis of appellee's complaint. Since the complaint and lease agreement, as incorporated, fairly read, leave little doubt that the matter in controversy exceeds $10,000 and arises under the Constitution of the United States, there is jurisdiction under 28 U.S.C. §1331."

In the instant case there is likewise no doubt that the matter in controversy arises under the Constitution of the United States, and such jurisdictional basis is alleged in the complaint. But jurisdiction under 28 U.S.C. §1331 was not specifically alleged in the complaint, although it is hard to believe that the value of the right to vote and have one's vote equally counted, does not likewise exceed the value of $10,000.

Seizing upon the footnote in *Calero-Toledo*, appellants at oral argument in the Court of Appeals in February 1975, raised the argument that the District Court had no original jurisdiction under 28 U.S.C. §1343 because like the District of Columbia—as held in *District of Columbia* v. *Carter*, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973), *rehearing denied*, 410 U.S. 953, 93 S. Ct. 1411, 35 L. Ed. 2d 694 (1973)—Puerto Rico is neither a 'State or Territory' within the meaning of that statute. An analysis of this argument shows that what the Commonwealth officials are really advocating is that the Fourteenth Amendment does not apply to Puerto Rico. Since they also insist that the Fifth Amendment is equally inapplicable, after the achievement of Commonwealth status, they contend that the ultimate decision concerning federally guaranteed rights of citizens, residents of Puerto Rico lies, not in the federal judiciary, but in the Commonwealth Courts.

The history of 42 U.S.C. §1983 has been set forth by this Court in *District of Columbia* v. *Carter, supra.* Briefly, the genesis of §1983 is in §1 of the Ku Klux Klan Act of 1871, Act of April 20, 1871, §1, 17 Stat. 13, the primary

purpose of which was "to enforce the Provisions of the Fourteenth Amendment". The commands of that Amendment are addressed only to the State or to those acting under color of its authority. But unlike the Amendment upon which it is based, §1983 applies equally to "any State or Territory". Congress has plenary control over the territories, but as pointed out in *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 546, 82 S. Ct. 1459, 1470, 8 L. Ed. 2d 671 (1962), the scope of delegated powers to the territories was nearly as broad as that enjoyed by the States.

The 1871 Act and the present §1983 were passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape,* 365 U.S. 167, 180, 81 S. Ct. 473, 480, 5 L. Ed. 2d 492 (1961). Everywhere the word "state" is included in the foregoing quote, it can be read "state or territory". These statutes, however, did not apply to either the federal government or the District of Columbia. *District of Columbia* v. *Carter, supra.* Federal laws and the acts of federal officials under color of authority are subject to review in the federal courts under the Constitutions and laws of the United States. Any statute allegedly depriving citizens of equal protection of the laws could be challenged under the Fifth Amendment and §§ 2282 and 2284 of Title 28. A federal official can be enjoined without enabling legislation, *Bivens* v. *Six Unknown Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Thus, while §1983 is inapplicable to the District of Columbia, there always exists a remedy in the federal courts to protect the rights, privileges and immunities guaranteed by the Fifth Amendment.

In *Montalvo* v. *Colon,* 377 F. Supp. 1332 (D.P.R. 1974) a post-*Calero-Toledo* decision, a similar issue was raised. *Montalvo* represented a challenge to Puerto Rico's criminal abortion statute in the light of this Court's decisions in *Roe* v. *Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and *Doe* v. *Bolten,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973). Injected into that controversy was the issue of whether the opinions of this Court applied to Puerto Rico, 377 F. Supp. at 1335 fn. 3. After reviewing the status of Puerto Rico as expressed in judicial decisions through the change in status from territory to Commonwealth, commencing with *Downes* v. *Bidwell,* 182 U.S. 244, 21 S. Ct. 770, 45 L. Ed. 1088 (1901) and ending with *Calero-Toledo* v. *Pierson Yacht Leasing Co.,* 416 U.S. 663, 94 S. Ct. 2080, 40 L. Ed. 2d 452 (1974), the three judge court concluded:

> "Finding such great similarity in the practical and theoretical application of the tests used as to both states and unincorporated territories, we may assume that the notion of 'fundamental rights, which has undergone such a metamorphosis in the context of interpretation of the Fourteenth Amendment, must be deemed to have had a similar expansion as to Puerto Rico. In addition, we think that we may safely assume that when a personal right has been found applicable to the states via the Fourteenth Amendment, we may then assume that such right is applicable to Puerto Rico, regardless of the theoretical means used to achieve such a result. After all, citizens of Puerto Rico, in common with citizens of states, are citizens of the United States. In addition, historically, when fundamental rights are involved, courts have been hesitant to find the protection of the United States Constitution lacking and this is no less true

since the advent of Commonwealth. See *Figueroa Ruiz* v. *Delgado, supra* [359 F.2d 718 (1st Cir. 1966)]. Nothing in the course of the creation of a new political status for Puerto Rico in 1950-1952 indicated that such a drastic change in regards to protection of fundamental personal liberties was contemplated. On the whole, therefore, while consideration must be given to the unique history and status of Puerto Rico, rights applicable to the states under the Fourteenth Amendment will be found similarly applicable to the Commonwealth". 377 F. Supp. at page 1341. (footnotes omitted).

The Court of Appeals' decision of February 28, 1975, when it dismissed the appellants' appeal, did not rely solely upon a comparison of the American citizens in Puerto Rico with the American citizens of the 51 states, as claimed by the appellants. It rejected, out of hand, the analogy between the District of Columbia and the Commonwealth of Puerto Rico. It said:

> "The Commonwealth's situation is precisely the opposite [from that of the District]. Indeed, the very reasons which called in *Calero Toledo* for the Commonwealth's special protection by a three-judge district court as a matter of comity and respect—its sovereign status and functional independence from Congressional control—call with equal force for the special protection of the Commonwealth's citizens against unwarranted and otherwise insufficiently checked governmental action provided by 42 U.S.C. §1983 and 28 U.S.C. §1343(3)"
>
> Appendix to Appellants' Brief, p. 35a.

There is nothing in either *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n. 1, 91 S. Ct. 156, 157, 27 L. Ed. 2d 174

(1970) or *Palmore* v. *United States,* 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973) that dilutes the *Montalvo* rationale or that of the Court of Appeals quoted above. Those cases do not deal with the status of either the District of Columbia or the Commonwealth of Puerto Rico nor with rights of citizens to challenge governmental action, but, in their procedural holdings, at least, only with the appellate power of this Court as expressed in 28 U.S.C. §1254 (2).

The main thrust of the Commonwealth's argument is that because it has a higher degree of autonomy over local matters than do states, and to consider it a territory would be demeaning, any federal court review of violations of allegedly federally protected rights, is incompatible with its *sui generis* status under the "Compact". (Public Law 600, 64 Stat. 319; 66 Stat. 327, 48 U.S.C. §731d.) That proposition and the purpose of the Civil Rights Act cannot be reconciled. It would shed all residents of Puerto Rico of the cloak of protection offered by the federal constitution.

Appellees are not stating that this Court must decide at this point whether for the future development of the unique relationship between the United States and Puerto Rico, the Fifth or Fourteenth Amendment must be invoked in all conceivable political, social or economic contexts. There may very well be areas where certain laws of Congress should not apply to Puerto Rico. But in the realm of fundamental rights afforded all citizens and aliens there can be no distinction between residents of Puerto Rico and any other part of this country. Foreclosing the federal court as the forum for redress of those rights would chill the assertion of constitutional right by penalizing those who choose to exercise them. If such a law were enacted by Congress it would be patently unconstitutional. *United States* v. *Jackson,* 390 U.S. 570, 581, 88 S. Ct. 1209, 1216, 20 L. Ed. 2d 138 (1968).

The denial of the franchise is the denial of a fundamental right. *Dunn* v. *Blumstein*, 405 U.S. 330, 92 S. Ct. 995, 31 L. Ed. 2d 274 (1972). Any law prohibiting access to the federal court to redress that right, would itself be a denial of equal protection. Nearly all State judges would feel themselves the equals of federal judges in protecting constitutional rights. The Puerto Rico Supreme Court is not unique in that respect. Nevertheless, Congress entrusted the task to the federal judiciary and there, as pointed out by the Puerto Rican federal judges in *Montalvo* v. *Colon*, *supra*, it should remain.

C. *The Injunction Is Properly Drawn.*

In 1972 Puerto Rico had elected a Governor and legislature dominated by the Popular Democratic Party. At the same time the majority of the voters of the Municipality of San Juan voted for a Mayor and Municipal Assembly representing the New Progressive Party. For three years that Municipal Assembly has been unable to effectively legislate, even within the limited sphere of its authority, because all important legislation requires a two-thirds majority. With the Governor's appointees (5) and the guaranteed minority representation (2), to the Governor's party, it is impossible to muster a two-thirds majority. The campaign promises and platforms of any duly elected majority party in San Juan, are thus, subject to the whim of a single person. This is not a representative democracy and the plaintiffs along with all who voted for the New Progressive Party are suffering irreparable injury.

At no time, not even at the hearing in April, 1975, did the appellants offer a form of injunction that they deemed appropriate. The proposal in their brief is incomprehensible. In effect, they are requesting either no Municipal

election in 1976, or another year of delay before the same injunction fashioned by the three-judge court is put into effect. It demonstrates the same cavalier attitude toward fundamental constitutional rights as displayed in their jurisdictional argument where they claim that they should be the final arbiter of those rights.

The injunction was reluctantly imposed only when the Commonwealth refused to act. It should be immediately reinstated.

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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